DOCKET

No. 08-970
Title: Sonny Perdue, Governor of Georgia, et al., Petitioners
v.
Kenny A., By His Next Friend Linda Winn, et al.
Docketed: February 2, 2009
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (06-15514, 06-15874)
Decision Date: July 3, 2008
Rehearing Denied: November 5, 2008
Questions Presented

Date	Proceedings and Orders
Jan 29 2009	Petition for a writ of certiorari filed. (Response due March 4, 2009)
Mar 4 2009	Brief of respondents Kenny A., By His Next Friend Linda Winn, et al. in opposition filed.
Mar 18 2009	DISTRIBUTED for Conference of April 3, 2009.
Apr 6 2009	Petition GRANTED limited to Question 1 presented by the petition for a writ of certiorari.
Apr 16 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 22, 2009.
Jun 9 2009	The time within which to file respondents' brief on the merits is extended to and including August 21, 2009.
Jun 20 2009	Brief amici curiae of National Sheriffs' Association, et al. filed.
Jun 22 2009	Joint appendix filed. (Statement of costs filed)
Jun 22 2009	Brief of petitioners Sonny Perdue, Governor of Georgia, et al. filed.
Jun 29 2009	Brief amicus curiae of United States filed.
Jun 29 2009	Brief amici curiae of Alabama, et al. filed.
Jun 29 2009	Brief amicus curiae of Washington Legal Foundation filed.
Jun 29 2009	Brief amici curiae of Old Republic Insurance Company, et al. filed.
Jun 29 2009	Brief amicus curiae of National School Boards Association filed.
Jun 29 2009	Brief amici curiae of National Governors Association, et al. filed.
Jun 29 2009	Brief amicus curiae of Association County Commissioners of Georgia filed.
Jul 16 2009	SET FOR ARGUMENT ON Wednesday, October 14, 2009.
Jul 30 2009	CIRCULATED.
Aug 3 2009	Record for the U.S.D.C. for the District of Georgia received from U.S.C.A. for the 11th Circuit. (20 boxes) There are sealed documents in the record.
Aug 3 2009	Record received from the U.S.C.A. for 11th Circuit. (1 envelope)
Aug 12 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 21 2009	Brief of respondents Kenny A., By His Next Friend Linda Winn, et al. filed. (Distributed)
Aug 28 2009	Brief amicus curiae of N.A.A.C.P. Legal Defense and Educational Fund, Inc. filed.
Aug 28 2009	Brief amici curiae of Small Private Law Firms That Rely on Statutory Fee Awards in Public Interest Litigation filed.
Aug 28 2009	Brief amici curiae of Liberty Legal Institute, et al. filed. (Distributed)
Aug 28 2009	Brief amici curiae of American Association for Justice, et al. filed. (Distributed)

Aug 28 2009	Brief amici curiae of New York State Bar Association, et al. filed. (Distributed)
Aug 28 2009	Brief amici curiae of Law and Economics Scholars Lucian A. Bebchuk, et al. filed. (Distributed)
Aug 28 2009	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Aug 28 2009	Brief amicus curiae of Civil Rights Clinic at Howard University School of Law filed. (Distributed)
Sep 21 2009	Reply of petitioners Sonny Perdue, Governor of Georgia, et al. filed. (Distributed)
Sep 30 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 14 2009	Argued. For petitioners: Mark H. Cohen, Atlanta, Ga; and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Paul D. Clement, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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No. 08-970

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?

2.

Is an enhancement to the lodestar based on quality of representation and results obtained contrary to this Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Defendants-Appellants and Petitioners: Sonny Perdue, in his official capacity as Governor of the State of Georgia; Georgia Department of Human Resources; B.J. Walker, in her official capacity as Commissioner of the Georgia Department of Human Resources; Fulton County Department of Family and Children Services; Dannette Smith, in her official capacity as Director of the Fulton County Department of Family and Children Services; DeKalb County Department of Family and Children Services; and Walker E. Solomon, II, in his official capacity as Director of the DeKalb County Department of Family and Children Services.

Plaintiffs-Appellees and Respondents: Kenny A., by his next friend Linda Winn; Kara B., by her next friend Linda Pace; Maya C., by her next friend Linda Pace; Phelicia D., by her next friend Theresa Roth; Sabrina E., by her next friend, Rebecca Silvey; Korrina E., by her next friend Rebecca Silvey; Tanya F., by her next friend Carol Huff; Priscilla G., by her next friend Roslyn M. Satchel; and Briana H., by her next friend Linda Pace, on their own behalf and on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Governor Sonny Perdue and the other Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated July 3, 2008, is officially reported at 532 F.3d 1209 (11th Cir. 2008) and is reproduced at Appendix A, at App. 1-93.

The fees opinion and order of the U.S. District Court for the Northern District of Georgia, dated October 3, 2006, is officially reported at 454 F. Supp. 2d 1260 (N.D. Ga. 2006) and is reproduced at Appendix B, at App. 94-172.

The en banc opinion of the U.S. Court of Appeals for the Eleventh Circuit, denying further review and the dissents thereto, dated November 5, 2008, is officially reported at 547 F.3d 1319 (11th Cir. 2008) and is reproduced at Appendix C, at App. 173-223.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on July 3, 2008. The order denying rehearing en banc was entered on November 5, 2008. The petition is

timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

On June 6, 2002, a class action complaint was filed on behalf of 3,000 foster children against numerous State of Georgia officials alleging both constitutional and statutory violations and seeking injunctive relief to alter the State's administration of the foster care system in two metropolitan Atlanta counties. After a period of initial discovery, the denial of Plaintiffs' motion for a preliminary injunction after a hearing, the denial of Defendants' motion to dismiss, and both lay and expert discovery, the District Court referred the parties to mediation. The mediation lasted four months and resulted in a consent decree approved by the District Court on October 27, 2005, which contained a comprehensive agreement on all pending issues except the amount of attorney's fees and expenses to award to Plaintiffs as prevailing parties pursuant to 42 U.S.C. § 1988.

On December 9, 2005, Plaintiffs' counsel filed their application for award of attorney's fees and expenses, claiming that they expended nearly 30,000 hours on the case resulting in a lodestar of $7,171,434.30, but seeking an enhancement of twice the purported lodestar, or a total fee award of $14,342,868.60. Defendants opposed the application, asserting in part that the lodestar should be reduced due to excessive hours and that the enhancement was not authorized based on the existing precedent of this Court.

The District Court, after finding that many of Plaintiffs' counsel's entries were "vague," "noncompensable," "excessive," and "unreasonable," reduced Plaintiffs' lodestar through a fifteen percent reduction in hours claimed, resulting in a monetary reduction of over $1,000,000 in the lodestar amount to $6,102,802.90. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1274-77, 1279-81, 1283, 1286 (N.D. Ga. 2006). However, even after recognizing that "most of the factors relevant to calculating a reasonable fee are already reflected in the lodestar amount" and should not serve as grounds for increasing the lodestar, the District Court nevertheless adjusted the lodestar upward by a 1.75 multiplier, for a total fee award of $10,522,402.08. *Id.* at 1288, 1290.

The District Court justified its enhancement to the lodestar for three reasons. First, the District Court concluded that the quality of service was "far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation," which ranged from $215 to $425 per hour. *Id.* at 1287-88. This conclusion was supported, according to the District Court, because: (1) class counsel were required to advance case expenses of $1.7 million over a three-year period, (2) class counsel were not paid on an ongoing basis while the work was being performed, and (3) class counsel's ability to recover fees was contingent on the outcome of the case. *Id.* at 1288.

Second, the District Court found that the "superb quality" of class counsel's representation "far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. In the District Court's view, Plaintiffs' counsel "brought a higher degree of skill, commitment, dedication, and professionalism" to the litigation than the District Court had observed by any other lawyers "in any other case during its 27 years on the bench." *Id.* at 1289.

Third, the District Court viewed Plaintiffs' success, achieved only by Defendants' agreement to a consent decree after court-ordered mediation, as "truly exceptional" and providing "sweeping relief to the plaintiff class." *Id.* The District Court observed that "[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

A panel of the Eleventh Circuit Court of Appeals affirmed the decision of the District Court. *Kenny A. v. Perdue*, 532 F.3d 1209 (11th Cir. 2008). In recognizing this Court's decisions "that bend[ ] decidedly against enhancements" of the lodestar,[1] one of the panel members concluded that "[t]he district court's

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[1] *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) ("*Delaware Valley I*"); *Blum v. Stenson*, 465 U.S. 886 (1984).

$4.5 million enhancement to the $6 million lodestar in the present case cannot be squared with the Supreme Court decisions we have discussed." *Id.* at 1221, 1225 (Carnes, J., concurring). According to Judge Carnes, none of the factors relied upon by the District Court (quality of service, contingency, and results obtained) justified the boosting of the award. *Id.* at 1225-31.

Nevertheless, the panel as a whole concluded that they were "not free to decide the enhancement issue" based upon the Eleventh Circuit's earlier decisions in *NAACP v. Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), both of which "were issued after the Supreme Court last spoke on the subject of enhancements for quality of representation and superior results, which was in the *Delaware Valley I* case." *Kenny A.*, 532 F.3d at 1236-37. In *NAACP* and *Norman*, the Eleventh Circuit vacated district court orders denying enhancements for superior results and issued remand instructions which left open the possibility that superior results coupled with superior performance could serve as the basis for an enhancement to the lodestar. *See NAACP*, 812 F.2d at 1336-37; *Norman*, 836 F.2d at 1302, 1306. As a later panel, Judge Carnes concluded that the panel was bound to follow *NAACP* and *Norman* based on the prior panel precedent rule, notwithstanding his conclusion that those holdings were wrong and conflicted with this Court's relevant

precedents.[2] *Kenny A.*, 532 F.3d at 1238 (Carnes, J., concurring). Judge Carnes concluded by stating:

> Of course, this Court sitting en banc, or the Supreme Court, can overrule any prior decisions of this Court. Unless and until this Court does overrule *NAACP* and *Norman*, we are constrained to let stand the $4,500,000 enhancement to the lodestar amount that is included in the district court's judgment in this case.

Id. at 1242.

The subsequent petition for rehearing en banc was denied by a 9-3 vote. *Kenny A. v. Perdue*, 547 F.3d 1319 (11th Cir. 2008). Judge Carnes, joined by Judges Tjoflat and Dubina, authored a dissent from the denial of rehearing en banc for "the first time in sixteen years on the bench," opining that this was "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." *Id.* at 1331 (Carnes, J., dissenting from the denial of

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[2] Judge Wilson agreed that the panel was bound by the prior panel precedents of *NAACP* and *Norman*, but believed that those precedents correctly held that enhancements of the lodestar amount should be permitted for quality of representation and the results obtained. *Kenny A.*, 532 F.3d at 1242 (Wilson, J., concurring). Judge Hill also agreed that they were bound by these prior panel precedents, and expressed his view that the opinions of Judges Carnes and Wilson were scholarly and "will be of interest to jurists who might wish to pursue the matter in further proceedings, should any arise." *Id.* at 1251 (Hill, J., concurring).

rehearing en banc) (citing Sup. Ct. R. 10(c)). Judge Carnes stated that the question of "whether a district court can [ ] increase the award beyond that reasonable amount [reflected in the lodestar] based on its finding that the attorney's performance was of superior quality and the results achieved were exceptional" is one that affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party." *Id.* at 1331-32, 1337-39. Judge Carnes summed up the critical importance of this appeal as follows:

> The record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can. It presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?

Id. at 1337.

Judge Tjoflat authored a separate dissent from the denial of rehearing en banc, reasoning in part that "it can never be appropriate to enhance the

attorney's fees in a case seeking injunctive relief on the basis of 'exceptional' or 'superior' results." *Id.* at 1330 (Tjoflat, J., dissenting from the denial of rehearing en banc). Judge Tjoflat concluded that, "I believe that a lodestar hourly rate that is already at the top of the relevant market is simply ineligible for an additional enhancement." *Id.* at 1330-31.

REASONS FOR GRANTING THE PETITION

In affirming the District Court's enhancement of a lodestar amount based on superior results, quality of representation, and the contingent nature of the case, factors that are normally subsumed within the lodestar calculation, the Eleventh Circuit has decided an important federal question in a way that conflicts with this Court's decisions regarding the application of federal fee-shifting statutes.

To the extent that the decisions of this Court have been interpreted by United States Courts of Appeals to permit an increase of an award of attorney's fees beyond the lodestar amount based on superior quality of representation and exceptional results, this is a question of federal law that has not been, but should be, settled by this Court in order to provide definitive and final guidance on this issue.

This Court should grant certiorari to address an issue affecting over one hundred federal fee-shifting statutes to enable uniform application with respect to

the manner in which petitions for enhancements to lodestar amounts are considered by trial courts.

A. An Enhancement to the Lodestar Based on Quality of Representation and Results Obtained, Particularly When the Lodestar Is Reduced for Excessive Hours Claimed, Has Not Been Favored in Prior Decisions of This Court.

Under the "American Rule," the prevailing litigant ordinarily is not entitled to collect a reasonable attorney's fee from the losing party unless there is an exception to the rule, such as a specific statutory authorization to the contrary. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 270 (1975). Following this Court's decision in *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to authorize courts to award a reasonable attorney's fee to a prevailing plaintiff in a civil rights action. *See* H.R. Rep. No. 94-1558, p. 1 (1976); S. Rep. No. 94-1011, p. 4 (1976). In determining the factors that should be considered in determining a reasonable fee, the legislative history of this enactment referred to the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974),[3] which

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[3] The *Johnson* factors are as follows:

(1) time and labor required;

(2) novelty and difficulty of the questions;

(Continued on following page)

included factors such as "the skill requisite to perform the legal service properly," "whether the fee is fixed or contingent," and "the amount involved and the results obtained." *Id.* at 718; *see also* H.R. Rep. No. 94-1558, p. 8 (1976); S. Rep. No. 94-1011, p. 6 (1976).

This Court first established the framework and methodology for calculating a reasonable attorney's fee award to a prevailing party pursuant to 42 U.S.C. § 1988 in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. The product of this calculation is commonly referred to as the "lodestar." *Pennsylvania v. Delaware Valley Citizens' Counsel for*

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(3) skill requisite to perform the legal service properly;

(4) preclusion of other employment by the attorney due to acceptance of the case;

(5) customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) amount involved and the results obtained;

(9) experience, reputation and ability of the attorneys;

(10) "undesirability" of the case;

(11) nature and length of the professional relationship with the client; and

(12) awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 91-94 (1989).

Clean Air ("*Delaware Valley I*"), 478 U.S. 546, 563 (1986). In *Hensley*, this Court indicated that the lodestar calculation "does not end the inquiry" and that there were other considerations "that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained,'" although it was also noted that many of the *Johnson* factors "usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 & n.9. This Court concluded the discussion of the issue of potential enhancements to the lodestar by stating that an enhanced award may be justified "in some cases of exceptional success." *Id.* at 435.

The issue of a potential enhanced award of attorney's fees next appeared in *Blum v. Stenson*, 465 U.S. 886 (1984), where a fee applicant was awarded a 50 percent upward adjustment over the lodestar to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved. *Id.* at 891. This Court held that these reasons did not support the increase to the lodestar, concluding that factors such as "complexity of the issues," "quality of representation," and "results obtained" are "normally" or "generally" reflected in either the number of billable hours or the hourly rates charged and should not usually provide an independent basis for increasing the fee award. *Id.* at 898-900. While the Court rejected the argument "that an upward adjustment to an attorney's fee is never appropriate under § 1988," it held that the evidence in *Blum* failed to establish

that an enhancement was needed to provide reasonable compensation for services rendered. *Id.* at 901.

This Court next considered the propriety of an enhancement of an award of attorney's fees in a fee-shifting statute in *Delaware Valley I*. Prior to considering the plaintiffs' request for "multipliers" to adjust the lodestar amount upward, the district court there in fact eliminated a significant number of hours claimed because they were not documented in sufficient detail or were excessive. 478 U.S. at 554. The district court nevertheless applied a multiplier of two to raise the lodestar based upon the contingent nature of the case and the superior quality of representation, which was affirmed by the Third Circuit. *Id.* at 555-56. This Court reversed. First, this Court held that it was error to increase the fee award based upon the "superior quality" of the attorneys' performance "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate," and the overall quality of a lawyer's performance "ordinarily should not be used to adjust the lodestar." *Id.* at 566. Importantly for the case at hand, this Court stated that "[t]he District Court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Id.* at 566-67. As there were no detailed findings of why the lodestar amount did not reflect the quality of representation or why the results were so superior,

this Court found no reason to increase the fee award for quality of representation. *Id.* at 568. This Court then withheld a decision as to whether an upward adjustment to the lodestar could be made based on the risk of loss and scheduled reargument. *Id.*

The question of whether an enhancement based upon the contingent nature of a fee is appropriate was initially left unresolved in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), but then was definitively resolved in *City of Burlington v. Dague*, 505 U.S. 557 (1992). This Court again stated that there is a "strong presumption" that the lodestar represents a reasonable fee and that the burden was on the fee applicant to establish that an upward adjustment "is *necessary* to the determination of a reasonable fee." *Dague*, 505 U.S. at 562 (emphasis added) (citing *Delaware Valley I* and *Blum*). The Court found that the difficulty of establishing the merits of a case, one of the factors to consider for risk of loss, is normally subsumed in the lodestar "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* The Court also found that the relative merits of the claim, the other factor in a contingent fee determination, should play no part in the calculation of a fee award. *Id.* at 563-65. "[W]e hold that enhancement for contingency is not permitted under the [federal] fee-shifting statutes at issue." *Id.* at 567.

Consequently, this Court has held that an enhancement to a lodestar amount for the contingent nature of the case is absolutely prohibited and that upward adjustment based upon superior performance and the results obtained should not usually be awarded, because these factors are normally subsumed within the lodestar calculation of the product of hours claimed multiplied by the hourly rate. Although it remains undefined what exceptional circumstances would justify an enhancement to the lodestar based upon superior performance and success obtained, it appears that the reduction of the hours claimed based upon vague, duplicative, and excessive entries would belie any contention that an upward adjustment based upon superior performance should be permitted.

B. This Court Should Grant Certiorari To Determine Whether a Reasonable Attorney's Fee Award Can Be Enhanced for Results Obtained or Quality of Performance and, If So, Whether Such an Enhancement Would Still Be Unauthorized When the Lodestar Is Reduced for Excessive Hours Billed.

The record in this case presents a clear opportunity to resolve the issue which this Court could not reach in *Blum* and *Delaware Valley I*: Can a reasonable attorney's fee award be enhanced for results obtained or quality of performance, or are those factors already subsumed into the lodestar, as *Delaware*

Valley I and *Dague* appear to indicate? *See Dague*, 505 U.S. at 562-63 (stating that the difficulty of establishing the merits of the claim "is ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so" and cautioning that "[t]aking account of it again through lodestar enhancement amounts to double counting"); *Delaware Valley I*, 478 U.S. at 565-66 (citing *Blum* for the proposition that "the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount" and explaining that "[c]alculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance"); *see also Kenny A.*, 547 F.3d at 1337 (Carnes, J., dissenting from the denial of rehearing en banc) ("[This case] presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?").

Petitioners respectfully contend that this issue has caused confusion in its application by district courts and review by the Courts of Appeals, and this case presents the best opportunity to resolve it. As Judge Carnes explained in his dissent from the denial of rehearing en banc, joined by Judges Tjoflat and Dubina, "[t]he record in this case and the facts and findings drawn from it present this important, unresolved issue *as well as any case will and better than almost any other case can*." *Kenny A.*, 547 F.3d at 1337 (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added).

The record shows that the District Court in this case itself reduced Plaintiffs' purported lodestar by more than $1 million for the excessive hours billed in order to arrive at a reasonable lodestar of $6 million, but the District Court then immediately turned around and enhanced its own reasonable lodestar determination by a 1.75 multiplier for a total fee award (not including expenses) of $10.5 million. *Kenny A.*, 454 F. Supp. 2d at 1266, 1286, 1290. The District Court based its enhancement on contingency and delay of payment (in contravention of *Dague*[4]),

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[4] The District Court interpreted this Court's decision in *Dague* as holding merely that "a lodestar enhancement cannot be based on contingency alone." *Kenny A.*, 454 F. Supp. 2d at 1288 n.8, *cited in Grable v. Gregory J. Barro, PLC*, 1:05-CV-3133-JEC, 2007 U.S. Dist. LEXIS 19709, at *14 n.8 (N.D. Ga. Mar. 19, 2007) (refusing, in contrast to *Kenny A.*, to grant an enhancement and stating that "in this case the reasoning of the Supreme Court for not enhancing an award applies").

the results obtained, and the superior quality of Plaintiffs' counsel's legal performance. *Id.* at 1288-89. The current state of the law is confusing to the Courts of Appeals and district courts as to whether an enhancement is ever appropriate based on results obtained or the quality of the performance, but it certainly makes no sense that an enhancement for results obtained or superior performance should be awarded when the district court itself determines the fee applicant's purported lodestar should be *reduced*, as the District Court in this case explained throughout its decision:

> *Billing Judgment Generally:* "The Court has reviewed the entries cited by State Defendants and agrees that many of the entries are too vague to permit the Court to determine whether the time was reasonably expended. Many of the entries also reflect purely administrative tasks that are non-compensable."
>
> *Complaint and Mandatory Disclosures:* "[B]ased on its experience in other complex class actions, 1,648.41 hours is excessive for pre-suit investigation and drafting the complaint and mandatory disclosures."
>
> *Document Production and Analysis:* "[T]he Court finds that more than 7,100 hours expended on document review and analysis over the two-and-one-half years between the filing of the complaint and the commencement of the mediation is unreasonable. That is the equivalent of more than one full-time

employee reviewing and analyzing documents continuously for that entire period."

Discovery Motions: "It was clearly unnecessary to have spent in excess of 60 hours preparing this response. The Court also agrees with State Defendants that an unreasonable number of plaintiffs' attorneys attended many of the discovery and status conferences conducted by the Court."

Intra- and Inter-Office Conferences and Correspondence: "[T]he Court believes that the very large number of attorneys and paralegals who worked on this case inevitably resulted in some duplication of effort. This is reflected by the fact that more than 8% of all the time expended on the case was devoted to communications among counsel. While some of this time was undoubtedly reasonable and necessary, the Court finds this percentage somewhat high even for a complex class action such as this."

Expert Witnesses and Reports: "[S]ome time entries by attorneys reflect time spent drafting and revising expert reports, work which should have been done by the experts themselves. Likewise, many of the paralegals' time entries reflect that the work performed was administrative and secretarial in nature."

Motion for Summary Judgment: "[T]he number of hours expended was unreasonable. One need only consider the fact that 1,720 hours is the equivalent of one attorney working full time for nearly an entire year to

> conclude that no response to a motion for summary judgment justifies such an expenditure of time."
>
> *Trial Preparation:* "[T]he Court cannot agree that it was reasonable to spend more than 2,000 hours on this task [for a trial which never occurred]."

Id. at 1274-75, 1277, 1279-81, 1283.[5]

A review of cases from the Courts of Appeals and various district courts shows the confusion that exists in this area. Judge Wilson in his concurring opinion in the denial of rehearing en banc maintains that there is no Circuit split on this issue. *See Kenny A.*, 547 F.3d at 1321 (Wilson, J., concurring in the denial of rehearing en banc) (citing *Kenny A.*, 532 F.3d 1209,

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[5] This case also demonstrates vividly the penalty that an enhancement can impose on a government agency that settles a case. The District Court indicated that "if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief 'as intricately detailed and comprehensive' as that contained in the Consent Decree." *Kenny A.*, 454 F. Supp. 2d at 1289-90. It only was through the efforts of Plaintiffs' counsel and Petitioners that this settlement was ever reached.

The District Court's enhancement of the lodestar effectively results in a penalty upon the State of Georgia and its officials for settling this case. If the District Court's award of attorney's fees and expenses is allowed to stand, the message to governments which have to defend similar class action claims will be clear: settlement of claims could result in the government getting assessed with a larger award of attorney's fees than if the case goes to trial and a "lesser" result is mandated. This will result in fewer consent agreements and more trials on the merits.

1242 (11th Cir. 2008); *Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Cir. 2004); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000); *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531-32 (8th Cir. 1999); *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997); *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993)).

However, unlike the cases cited by Judge Wilson where circuit courts have interpreted this Court's decisions as permitting an enhancement to the lodestar based upon quality of performance and results obtained, other circuit and district courts have concluded otherwise. *See, e.g., Jordan v. Multnomah County*, 815 F.2d 1258, 1262 n.6 (9th Cir. 1987) ("Among the *Johnson* factors that cannot serve as independent bases for adjusting fee awards are: (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained.") (citing *Blum* and *Delaware Valley I*); *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d 601, 607-08 (7th Cir. 1986) ("Finally, one can question whether enhancement for exceptional success is *ever* appropriate. 'The lodestar figure includes most, *if not all*, of the relevant factors comprising a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure

legal assistance.'") (quoting *Delaware Valley I*) (emphasis added); *Shakman v. City of Chicago*, No. 69 C 2145, 2008 U.S. Dist. LEXIS 21431, at *20-21 (N.D. Ill. Mar. 18, 2008) ("[T]he Seventh Circuit has questioned whether 'an enhancement for exceptional circumstance is *ever* appropriate' in fee-shifting cases.") (citing *Burlington Northern*); *Lorillard Tobacco Co. v. Engida*, No. 06-CV-00225-LTB, 2008 U.S. Dist. LEXIS 62862, at *9 (D. Colo. July 30, 2008) (stating that novelty, difficulty, and result achieved are "presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award") (quoting *Delaware Valley I*); *Nintendo of Am., Inc. v. NTDEC*, 822 F. Supp. 1462, 1467 (D. Ariz. 1993) ("Specifically, the subsumed factors are: the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, the results obtained and the superior performance of counsel."); *Campbell v. Kansas State Univ.*, 804 F. Supp. 1393, 1396 (D. Kan. 1992) ("The novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent reasons for increasing the fee award."); *Cary v. Chicago Hous. Auth.*, No. 87 C 6998, 1992 U.S. Dist. LEXIS 6176, at *19-22 (N.D. Ill. Apr. 29, 1992) (refusing enhancement on one hand because "the Supreme Court found in [*Delaware Valley I*] that upward adjustments of the lodestar for the 'superior quality' of counsel's performance were redundant to factors in

the lodestar calculation, and impermissible," but then granting enhancement on grounds that "the *Delaware Valley I* court did hold out the possibility that an upward adjustment to the lodestar may be obtained in cases of 'exceptional' results"); *Americans United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 717 F. Supp. 488, 502 (W.D. Mich. 1989) ("*Blum* states explicitly that the results obtained do not justify enhancing an otherwise reasonable fee."); *Bishop v. Osborn Transp., Inc.*, 687 F. Supp. 1526, 1533 (N.D. Ala. 1988) ("From a reading of [*Hensley*, *Blum*, and *Delaware Valley I*], the *Johnson* factors 1, 2, 3, 5, 8 and 9 are clearly subsumed within the initial calculations of hours reasonably expended at a reasonable hours rate.").

In Judge Carnes' opinion, there are two contradictory ways to read *Delaware Valley I*, and he respectfully encourages that the correct reading should be made clear by this Court. One way to read *Delaware Valley I* is holding that "an enhancement for superior representation and exceptional results *is never permitted*; and *even if it were*, there was insufficient evidence or findings of anything special in that case." *Kenny A.*, 547 F.3d at 1334 (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added). The other way to read the decision is that such enhancements are allowed, but only with "*specific evidence and findings* to support the conclusion that the quality of representation and results obtained were truly special." *Id.* (emphasis added).

Whichever method is correct, the fact remains that attempts by the Courts of Appeals to provide guidance have only further confused rather than clarified the issue for district courts. As just one example, in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit tried to define with particularity what can constitute superior performance worthy of a lodestar enhancement:

> [W]e think that this genius factor diminishes and eventually disappears as the number of hours expended on the case increases. A brilliant idea may shortcut one aspect of the case and save many hours, but in protracted litigation a lawyer is also likely to pursue blind alleys and expend many unproductive hours. In a case such as the one at bar, in which more than 9000 hours were reported, we do not believe that any adjustment for extraordinary performance could be warranted. We also believe that the greater the number of attorneys involved on a side, the less likely it is that an extraordinary performance bonus is appropriate. Here the plaintiffs utilized 12 attorneys, 5 of whom expended more than 200 hours. In such a case it is unlikely that the genius of one lawyer will so affect the case that a bonus would be warranted. Furthermore, in awarding a genius bonus the district court should take care not to duplicate the skill reflected in the attorney's billing rate. Thus, we believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should be rarely awarded, and should be confined to

> cases in which the bulk of the work was done by a single attorney who exhibits extraordinary skill or to cases in which the work was done well in a relatively short time given the complexity of the task.

Id. at 557.[6] Highlighting the confusion in this area and the various applications of this Court's instructions, this aspect of the *Ramos* decision has both been questioned by at least one district court from another Circuit in light of subsequent Supreme Court precedent,[7] and more recently, it has been followed by a district court in the same Circuit.[8]

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[6] In this case, "[t]he time records submitted in support of plaintiffs' fee application show that plaintiffs' [thirty-eight] attorneys, paralegals, and legal interns devoted a total of 29,908.73 hours to this litigation," far more than the number of timekeepers and hours for which fee recovery was sought in *Ramos*. *Kenny A.*, 454 F. Supp. 2d at 1273-74.

[7] *See Liberles v. Daniel*, 619 F. Supp. 1016, 1019 (N.D. Ill. 1985) ("*Ramos* was decided a year before *Blum*, and its explanation of 'exceptional success' has been limited to some extent by the Supreme Court. In particular, the Supreme Court rejected (in most cases) one of the two primary reasons offered by the Tenth Circuit for enhancing a fee: the results achieved in the case.").

[8] *See Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 U.S. Dist. LEXIS 26377, at *34-35 (N.D. Okla. Aug. 29, 2003) ("Like *Ramos*, this case is protracted litigation involving thousands of attorney hours. The case did not establish new law or result in a total victory. It instead resulted in a compromise that achieved excellent results for Plaintiffs' clients and the City of Tulsa as a whole. Although Plaintiffs did have to battle larger law films and endured a period of significant discovery disputes, these disputes were of a kind to be anticipated in such litigation

(Continued on following page)

As the Second Circuit Court of Appeals explained in a 2007 decision, with former Justice O'Connor sitting by designation, "[o]ur fee-setting jurisprudence has become needlessly confused," and it respectfully laid some of the responsibility with this Court for never fully resolving the interplay between the lodestar method and the *Johnson* factors:

> And the Supreme Court has not yet fully resolved the relationship between the two methods. In cases decided after *Hensley* and *Blum*, it has both (1) suggested that district courts should use the *Johnson* factors to adjust the lodestar, *see, e.g., Blanchard*, 489 U.S. at 94 (stating that the district court should arrive at an initial estimate and then "adjust this lodestar calculation by other factors"); *see also id.* ("The *Johnson* factors may be relevant in adjusting the lodestar amount. . . ."); *Pierce v. Underwood*, 487 U.S. 552, 582-83 (1988) (Brennan, J., concurring) (suggesting that factors might exist "that would justify an enhancement of the lodestar"), and (2) reiterated its holding in *Hensley* and *Blum* that "many of the *Johnson* factors 'are subsumed within the initial calculation.'" *Del. Valley I*, 478 U.S. at 564.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 484 F.3d 162, 163 (2d Cir. 2007); *see also Norwood v. Charlotte Mem'l Hosp. & Med.*

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and Plaintiffs' counsel is being fully compensated for that time.").

Ctr., 720 F. Supp. 543, 547 (W.D.N.C. 1989) (stating that the difficulties courts experience in applying the "instructions" for attorney's fee awards result from misunderstanding regarding proper application of the *Johnson* factors).

As recently as this summer, Judge Lamberth of the District Court for the District of Columbia attempted to divine this area of the law and ultimately concluded that "the lodestar, calculated using counsel's established billing rates, adequately reflects this superior quality of representation." *Miller v. Holzmann*, 575 F. Supp. 2d 2, 54 (D.D.C. 2008). The court noted that the District of Columbia Circuit had years ago lamented in *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982): "district courts' increasing predilection for 'adjust[ing] the lodestar upward to reflect what the courts [subjectively] view as a high . . . quality of representation,' . . . 'should stop.' It stops here." *Miller*, 575 F. Supp. 2d at 54 (quoting *Donnell*, 682 F.2d at 254) (brackets in original). Moreover, specifically citing this case, Judge Lamberth "agree[d] with Judge Carnes of the Eleventh Circuit Court of Appeals that 'bad and excessive billing is inconsistent with superb lawyering'" and emphasized that "[a]nalogously, routinely devoting excessive manpower to tasks is inconsistent with efficient case management" and should prohibit any enhancement of the lodestar. *Id.* at 49 n.76 (quoting *Kenny A.*, 532 F.3d at 1229).

This case starkly shows the confusion and inconsistent application of this Court's existing attorney's

fee precedent. The District Court's award lays bare the substantial costs that can be imposed on a government defendant when misapplication occurs, especially when the district court concludes on the one hand that the purported lodestar is excessive and reduces it, but then nevertheless with the other hand provides a fee enhancement. *See Kenny A.*, 547 F.3d at 1335 ("The bottom line for certiorari review purposes, however, is that the law of the Eleventh Circuit permits this kind of enhancement, and *that law was applied to permit a $4.5 million enhancement of the lodestar amount in this case.*") (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added).

The important unresolved question presented by this case is whether "no evidence or findings can ever justify an enhancement on performance and results grounds because the lodestar already takes into account all of the factors that go into how well an attorney performs and the result obtained." *Id.* at 1336. Certainly, some federal judges believe that "[t]he decisions in *Dague* and *Delaware Valley* imply as much." *Id.* If so, as the Court of Appeals and District Court decisions in this case show, "the Supreme Court needs to tell those . . . on the lower courts because that point has not gotten across." *Id.*

Given the confusion over the proper application of results obtained and superior performance in calculating attorney's fee awards pursuant to federal fee-shifting statutes, Petitioner respectfully requests that this Court grant certiorari to resolve finally

whether results obtained or quality of performance can provide an appropriate basis for enhancing the lodestar, or whether these factors are always subsumed in the lodestar such that providing an enhancement based on these factors is impermissible. *See Blum*, 465 U.S. at 899 (stating that "the District Court's rationale for providing an upward adjustment for quality of representation is a clear example of double counting"). Even if this Court concludes that enhancement for results obtained and quality of representation is still possible, this Court should further decide whether such enhancement is ever appropriate if the lodestar has been reduced due to excessive hours billed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 06-15514 & 06-15874

D. C. Docket No. 02-01686-CV-MHS-1

KENNY A., by his next friend Linda Winn,
KARA B., by her next friend Linda Pace,
MAYA C., by her next friend Linda Pace,
PHELICIA D., by her next friend Theresa Roth,
SABRINA E., by her next friend Rebecca Silvey,
KORRINA E., by her next friend Rebecca Silvey,
TANYA F., by her next friend Carol Huff,
PRISCILLA G., by her next friend Roslyn M. Satchel,
BRIANA H., by her next friend Linda Pace,
on their own behalf and on behalf of all others
similarly situated,

Plaintiffs-Appellees-
Cross-Appellants,

versus

SONNY PERDUE, in his official capacity as
Governor of the State of Georgia,
DEPARTMENT OF HUMAN RESOURCES
OF THE STATE OF GEORGIA,
JAMES MARTIN, in his official capacity as
Commissioner of the Department of
Human Resources of the State of Georgia,
DIVISION OF FAMILY AND CHILDREN SERVICES,
Fulton County,

BEVERLY JONES, in her official capacity as Director of the Fulton County Department of Family and Children Services,
DEKALB COUNTY DFCS,
WAYNE DRUMMOND, in his official capacity as Director of the DeKalb County Department of Family and Children Services,

Defendants-Appellants-Cross-Appellees,

FULTON COUNTY,
DEKALB COUNTY,

Defendants.

Appeals from the United States District Court for the Northern District of Georgia

---

(July 3, 2008)

Before CARNES, WILSON and HILL, Circuit Judges.

CARNES, Circuit Judge:

When asked how much money would be enough for him, John D. Rockefeller reportedly said: "Just a little bit more."[1] The attorneys for the plaintiff class in this case want more than just a little bit more. They want a lot more money than they would receive from multiplying the number of hours they worked on this case by the hourly rate they charge. And the

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[1] Robert M. Sharp, *The Lore and Legends of Wall Street* 233 (1989).

district court gave them a lot more – $4,500,000 more – out of the pockets of the taxpayers of Georgia.

Not caught up in the district court's spirit of generosity with their money, the Georgia taxpayers (through their governor and other officials who are defendants) have appealed the attorneys' fees award because of that multi-million dollar enhancement and for other reasons. The plaintiffs' attorneys, convinced that the district court was not generous enough, have cross-appealed (through the class they represent), insisting that they deserve even more than the $10,500,000 total fees that the court awarded them.

I.

Kenny A. and eight other named plaintiffs in this lawsuit are foster children in the custody of the Georgia Department of Human Resources. *Kenny A. ex rel. Winn v. Perdue,* 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006) (*Kenny A. III*). In June 2002, on behalf of a class of all foster children in Fulton and DeKalb Counties and a subclass of African American foster children, the plaintiffs sued the governor, DHR, its commissioner, Fulton and DeKalb Counties, each county's department of family and children services, and the director of each of those departments. *Id.* at 1266-67. The complaint alleged systemic deficiencies in the counties' foster care systems. *Id.* at 1267. These deficiencies, according to the complaint, included:

> (1) assigning excessive numbers of cases to inadequately trained and poorly supervised

> caseworkers; (2) not developing a sufficient number of foster homes properly screened to ensure the plaintiff children's safety; (3) not identifying adult relatives who could care for the plaintiff children as an alternative to strangers or impersonal institutions; (4) failing to provide relevant information and support services to foster parents in order to prevent foster placements from being disrupted; (5) failing to develop administrative controls such as an information management system that ensures plaintiff children are expeditiously placed in a foster home matched to meet the children's specific needs; (6) failing to provide timely and appropriate permanency planning, including failing to provide services that would enable plaintiffs to achieve their permanency planning goals; (7) placing plaintiffs in dangerous, unsanitary, inappropriate shelters and other placements; (8) failing to provide appropriate and necessary mental health, medical, and education services to children in their custody; and (9) separating teenage mothers in foster care from their own children and separating siblings in foster care from each other without providing visitation.

Id.

The complaint asserted fifteen causes of action under federal and state law. *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 283 (N.D. Ga. 2003) (*Kenny A. I*). The federal law claims included alleged violations, brought under 42 U.S.C. § 1983, of the class

members' Fourteenth Amendment rights to substantive and procedural due process and their First, Ninth, and Fourteenth Amendment rights to liberty, privacy, and association. *Id.* The complaint also alleged violations of the class members' statutory rights under the Adoption Assistance and Child Welfare Act of 1980, the Multiethnic Placement Act of 1994, as well as violations of the early and periodic screening, diagnosis, and treatment program of the Medicaid Act. *Id.* The state law claims asserted included violations of the class members' substantive due process and equal protection rights under the Georgia Constitution, violations of various Georgia statutes, and claims of nuisance, breach of contract, and inadequate and ineffective legal representation. *Id.* The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. *Id.* at 283 n.1.

The district court denied the defendants' motions to dismiss and for summary judgment. *Kenny A. III*, 454 F. Supp. 2d at 1269; *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1355 (N.D. Ga. 2005) (*Kenny A. II*); *Kenny A. I*, 218 F.R.D. at 305. It certified the class of all foster children in the Fulton and DeKalb County foster care systems, and the subgroup of African American foster children "who have had, or are subject to the risk of having, their adoption delayed or denied on the basis of their race or color," *Kenny A. I*, 218 F.R.D. at 305, and set the case for trial, *Kenny A. III*, 454 F. Supp. 2d at 1268-69.

At the same time, the district court referred the case to mediation. *Id.* at 1269. As that court would later describe it, "over the next four months the parties attended eighteen separate mediation sessions where they spent more than 110 hours trying to hammer out a settlement agreement." *Id.* They were eventually successful. *Id.*

In May 2006 the district court gave final approval to the settlement between the plaintiff class and Fulton and DeKalb Counties; the parties agreed to an attorneys' fees award in that part of the case; the district court entered that award, and it has not been appealed. This appeal arises from the settlement involving the rest of the defendants, which was approved by the district court in October 2005. *Id.* The court summarized that settlement this way:

> Its centerpiece is a series of thirty-one outcome measures that State Defendants have agreed to meet and sustain for at least three consecutive six-month reporting periods.
>
> The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect; regular visits of foster children by case workers; approval and licensure of foster homes and other placements; the percentage of children who are the victims of substantiated maltreatment while in foster care; the percentage of children in foster homes that exceed their

licensed capacity; the percentage of children who have experienced multiple moves while in foster care; and periodic judicial reviews of the safety and status of foster children.

In addition, the Consent Decree requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children.

Moreover, State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a "needs assessment" to be conducted by a neutral expert. The settlement also includes processes for the supervision of private contract agencies that provide homes and services for foster children; improvements in foster parent screening, licensing and training, as well as foster parent support and communication; improvements in case manager training; improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in

> foster care; and improvements in efforts to maximize available federal funding.
>
> Finally, the settlement provides that two child welfare specialists will serve as the Court's independent accountability agents charged with the responsibility of measuring and reporting publicly on the State Defendants' compliance with these and other undertakings as specified in the Consent Decree.

Id. at 1289.

The 2005 settlement agreement further acknowledged that "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 23(h)." The agreement said that the parties would "attempt without court intervention to resolve the proper amount of Class Counsel's fees and expenses of litigation." If the parties could not reach an agreement, then "[t]he amount of any award shall be determined by the Court in accordance with the requirements of applicable law and procedures."

That is what happened. Because the parties could not agree on the amount of fees, the class filed a motion for the court to make a determination and award. *Id.* at 1269-70. It was accompanied by 2,500 pages of billing records, by affidavits from the two lead counsel for the class, and by affidavits from five Atlanta area attorneys who were not involved in the case. *Id.* at 1270, 1290. The motion sought a total of

$14,342.860 in fees. *Id.* Half of that amount, $7,171,434.30, was to compensate the attorneys and their paralegals for the 29,908.73 hours they claimed to have worked at rates they sought; those rates ranged from $75 to $495. *Id.* The other $7,171,434.30 they sought was to be an enhancement of the fee award for a job well done. *Id.*

The defendants objected to some of the hourly rates requested and to the number of hours claimed. *Id.* They broke down the 2,500 pages of submitted billing records into fifteen categories of hours representing different stages of the case, and argued that in fourteen of those categories the plaintiffs' attorneys had expended more hours than was reasonably necessary to effectively represent the class. *Id.* at 1273-74 & n.5. The defendants also argued that many of the entries on the billing records were too vague to support a claim for compensation. *Id.* at 1274.

As for the request that the fee award be doubled by means of a $7 million enhancement, the defendants objected, arguing that this was not one of the rare cases in which an enhancement would be appropriate. They argued that enhancing the fee based on the results obtained would be improper because the skill of the plaintiffs' attorneys in litigating the case would already have been taken into account in setting their hourly rates. Double counting the skill factor would be inappropriate, the defendants argued.

The district court overruled all of the defendants' objections to the hourly rates sought by the plaintiffs'

attorneys. *Id.* at 1285. It granted in full each hourly rate requested, ranging from $215 to $495 for plaintiffs' attorneys, depending on their relative skill and experience. *Id.* at 1284-85. The court did not reduce the requested rates at all even though some of them were New York rates instead of Atlanta rates, and even though some of the attorneys (for example, Marcia Robinson Lowry, one of the two lead attorneys) recently had been awarded a smaller hourly rate for work on another case of exactly the same type. *Id.* at 1284-86. Likewise, the court approved in full the requested hourly rates of $75 to $150 for paralegal work. *Id.* at 1285.

The district court did partially sustain the defendants' objection to the number of hours that the plaintiffs' attorneys claimed to have worked on the case. *Id.* at 1274. The court agreed with the defendants that some of the entries on counsel's billing records were vague and that the hours claimed for eight of the fifteen billing categories were excessive. Those eight excessively billed categories were: (1) preparing the complaint and mandatory disclosures; (2) litigating the preliminary injunction motion; (3) producing and analyzing documents; (3) [sic] litigating discovery motions; (4) [sic] conferencing with each other; (5) [sic] preparing expert witness reports; (6) [sic] responding to the summary judgment motion; (7) [sic] preparing for trial; and (8) [sic] travel. *Id.* at 1274-84, 1286.

The court dealt with the vague and excessive billing two ways, one for the non-travel hours and the

other for travel hours. It made "an across-the-board 15% reduction in the number of non-travel related hours claimed by plaintiffs' counsel." *Id.* at 1286. This 15 percent reduction amounted to 4,371.22 hours being sliced off the 29,141.46 total number of non-travel hours for which the attorneys had requested compensation. In dollar terms, that amounted to a reduction of $1,040,176.92 in non-travel related attorneys' fees. To remedy the vagueness and excessive billing problem as it related to travel hours, the court halved the hourly rate, thereby effectively halving the number of travel hours that were compensated from 767.27 to 383.64, which amounted to a reduction of $118,460.75. When travel and non-travel fees are considered together, the court reduced the overall $7,171,434.30 fee request by $1,158,631.40, which amounted to an overall reduction of 16 percent. After the reductions, the total award was $6,012,802.90 before enhancement. *Id.*

On the applicability of an enhancement to the fee request, the court overruled the defendants' objections. *Id.* at 1288. The court found that the plaintiffs' attorneys were entitled to an enhancement because their hourly rate did "not take into account (1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense

reimbursement were completely contingent on the outcome of the case." *Id.* (footnote omitted).

The district court also found that "the superb quality of [counsel's] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the [fee]." *Id.* at 1288-89. The court commented that "[q]uite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289. Finally, the court said that an enhancement was appropriate because "the evidence establishes that plaintiffs' success in this case was truly exceptional." *Id.*

For these reasons, and based on the affidavits of some Atlanta area attorneys urging the court to enhance the fee award (even more than it did), the court multiplied the $6,012,802.90 fee award by 1.75, thereby enhancing it by 75 percent or $4,509,602.00. *Id.* at 1290. That enhancement boosted the total fee award to $10,522,405.08. *Id.*

II.

In reviewing the decisions of the district court raised in this appeal and cross-appeal, we look at questions of law anew but we review the court's findings of fact only for clear error. *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 442 F.3d 1283, 1287 (11th Cir. 2006). The abuse of

discretion standard applies to the district court's determination of the number of compensable billable hours, the hourly rate at which plaintiffs' counsel is compensated, the award of costs and expenses, and the enhancement decision. *See Am. Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 439 (11th Cir. 1999); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1248-49 (11th Cir. 1991). In applying the abuse of discretion standard, we keep in mind that "[w]hen a district court has discretion, there are usually a range of choices it may make and still be affirmed; there is not only one right choice for the court to make." *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1298 (11th Cir. 2002); *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001) (same). This is true "even though we would have gone the other way had it been our call." *Rasbury v. Internal Revenue Serv.*, 24 F.3d 159, 168 (11th Cir. 1994).

Of course, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996); *accord Schlup v. Delo*, 513 U.S. 298, 333, 115 S. Ct. 851, 870 (1995) (O'Connor, J., concurring) ("It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law."). We may also find an abuse of discretion if the district court failed to follow proper procedures in making its determination, based an award upon findings of fact that are clearly erroneous, or committed a clear error of judgment. *Johnson v. Breeden*, 280 F.3d 1308, 1326

(11th Cir. 2002); *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1333 (11th Cir. 1996); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994).

III.

In their cross-appeal the plaintiffs contend that the district court abused its discretion in two respects: (1) by not applying the common fund and common benefit doctrines, which would have resulted in a fee award substantially higher than the one they received; and (2) by not compensating them for the $801,864.40 they spent on expert witness expenses. The district court resolved each of those two issues correctly, and we affirm its decision of them on the basis of the reasoning contained in its opinion. *Kenny A. III*, 454 F. Supp. 2d at 1270-72, 1291-92.

IV.

The defendants conceded in the settlement agreement that the class had prevailed in the litigation and was entitled to recover reasonable attorneys' fees under 42 U.S.C. § 1988. That section provides in relevant part that in any action, like this one, where the plaintiffs seek to enforce their constitutional rights under 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

In their appeal the defendants contend that the district court abused its discretion in three ways. Their first contention is that the district court should not have awarded the plaintiffs' attorneys all of the photocopying expenses they claimed. *See Kenny A. III*, 454 F. Supp. 2d at 1294-95. Although we probably would not award the full amount of the claimed expenses if we were deciding the matter in the first instance, we cannot say that the district court abused its discretion in doing so.

V.

We turn now to the defendants' other contentions, starting with their argument that the district court erred in calculating the lodestar amount. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983). The product of this formula is the "lodestar," *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (per curiam), which is "the guiding light of our fee-shifting jurisprudence," *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 2641 (1992).

Although the defendants no longer contest the hourly rate component of the district court's lodestar

calculation,[2] they do contend that the district court compensated the plaintiffs' attorneys for an unreasonable number of hours. As we have already explained, the court essentially cut the total number of hours submitted by 16 percent because of vague entries and excessive billing. *See supra* at 10-11. We have held that where the billing records are voluminous, as they are here, a district court may make a reasonable across the board reduction in hours instead of engaging in the pick and shovel work necessary to make a more precise determination. *See Loranger,* 10 F.3d at 783. Even so, the defendants argue, the district court's cut was unreasonably shallow – it should have cut much deeper.

The district court's reduction of only 16 percent in the submitted hours does appear charitable, maybe even excessively so, in favor of the plaintiffs' attorneys, but we are not quite convinced that it was a clear error of judgment, which is what we would have to conclude in order to find an abuse of discretion. *See Johnson,* 280 F.3d at 1326; *SunAmerica Corp.,* 77 F.3d at 1333; *BankAtlantic,* 12 F.3d at 1048. Even though we would have cut the billable hours more if we were deciding the matter in the first instance, we cannot say that the result the district court reached

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[2] The defendants did object in the district court that the hourly rates requested were too high, but they have not raised that as an issue on appeal. Accordingly, we have no occasion to pass on that matter, but we do not mean to imply approval of those hourly rates, which appear to be on the generous side.

was outside the range of permissible choices on this record. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1103-1104 (11th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 711-12 (11th Cir. 2004); *Rasbury*, 24 F.3d at 168.

VI.[3]

The defendants' final contention is that the district court should not have granted plaintiffs' attorneys a $4.5 million enhancement to the $6 million lodestar amount. That contention can claim the favor of a presumption, and not a weak one either. The Supreme Court has instructed us that there is a "strong presumption" that the lodestar figure, without any adjustment, is the reasonable fee award. *Dague*, 505 U.S. at 562, 112 S. Ct. at 2641; *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 3098 (1986) (*Delaware Valley I*). That strong presumption can be rebutted only in "rare" and "exceptional" cases, *Delaware Valley I*, 478 U.S. at 565, 106 S. Ct. at 3098, where the fee applicant has shown that without an

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[3] The views expressed in Parts I-V and Part VII of this opinion represent the views of a majority of the Court, consisting of Judges Carnes and Hill. The views expressed in this part, Part VI, of this opinion represent the views of the author of this opinion alone. The views of Judge Hill on the question addressed in this part are expressed in his separate concurring opinion. The views of Judge Wilson are expressed in his separate concurring opinion.

upward adjustment of the lodestar amount the fee would be unreasonable, *Dague,* 505 U.S. at 562, 112 S. Ct. at 2641. Even in the rare and exceptional case where an enhancement is permissible, it must be "supported by both 'specific evidence' on the record and detailed findings by the lower court." *Delaware Valley I,* 478 U.S. at 565, 106 S. Ct. at 3098.

A.

In order to appreciate just how rare and exceptional a case must be for an enhancement of the lodestar amount to be permissible these days, a review of the evolution of Supreme Court thinking in this area is necessary. The history of the issue is one of early, tentative statements indicating more receptiveness to enhancements than the statements and holdings of later decisions actually permit. Suggestion has been followed by retrenchment, resulting in a decisional arc that bends decidedly against enhancements.

Hensley, a 1983 decision, was the Court's first stab at interpreting what Congress meant by a "reasonable fee" under § 1988 and similar fee-shifting statutes. In that case the Court adopted the lodestar method for calculating fees. *Hensley,* 461 U.S. at 433-34, 103 S. Ct. at 1939-40. In doing so, the Court said that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433, 103 S. Ct. at 1939.

It added, however, that this "does not end the inquiry," because "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Id.* at 434, 103 S. Ct. at 1940. The context in which that statement was made, however, was not one of upward enhancement.

Instead, the actual adjustment issue decided in *Hensley* was whether the lodestar figure should be reduced for plaintiffs who have achieved only partial or limited success. *See id.* at 426, 103 S. Ct. at 1935-36 ("The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims."); *see also id.* at 434-37, 103 S. Ct. at 1940-41. The Court decided that the fees should be reduced by the amount spent on claims that do not succeed. *Id.* at 440, 103 S. Ct. at 1943 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."); *see also id.* ("[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."). Even though the issue of enhancements was not presented in *Hensley*, the opinion does contain this dicta: "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases

of exceptional success an enhanced award may be justified." *Id.* at 435, 103 S. Ct. at 1940. The use of "may be" instead of "will be" was a harbinger of decisions to come.

The next term the Supreme Court decided *Blum v. Stenson,* 465 U.S. 886, 104 S. Ct. 1541 (1984), which, unlike *Hensley,* was a case in which the district court had actually awarded an enhancement. *Id.* at 891, 104 S. Ct. at 1545. The court had enhanced the lodestar figure by 50 percent "because of the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit to the large class that was achieved." *Id.* (quotation omitted). Unimpressed with that reasoning, the Supreme Court held that awarding the enhancement was an abuse of discretion. *Id.* at 896-902, 104 S. Ct. at 1547-50.

While repeating the *Hensley* opinion's statement that "in some cases of exceptional success an enhanced award may be justified," *id.* at 897, 104 S. Ct. at 1548 (quotation omitted), the *Blum* Court qualified that possibility with the statement that the lodestar amount "is presumed to be the reasonable fee contemplated by § 1988," *id.* The Court then considered and rejected each of the district court's four justifications for the enhancement. It began:

> The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable

> hours times reasonable hourly rates. There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

Id. at 898-99, 104 S. Ct. at 1549.

The *Blum* Court then moved on to the next factor:

> The "quality of representation" . . . generally is reflected in the reasonable hourly rate. It, therefore, may [note the use, again, of the word "may" instead of "will"] justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

Id. at 899, 104 S. Ct. at 1549 (words in brackets added). Otherwise, the Court said, "an upward adjustment for quality of representation is a clear example of double counting." *Id.* The Court found the district court's opinion that "[t]he quality of work performed by counsel throughout this case was high," without any specific evidence to support it,

insufficient to justify the enhancement. *Id.* at 899-90, 104 S. Ct. at 1549 (quotation omitted).

Regarding the results obtained factor, the Court reasoned that successful results are to be considered when calculating counsel's hourly rate. *Id.* at 900, 104 S. Ct. at 1549-50. "Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Id.* (footnote omitted).

The *Blum* Court left for another day the question of whether the risk borne by the plaintiffs' counsel in taking the case on a contingency basis could ever justify an enhancement of the lodestar. *Id.* at 901 n.17, 104 S. Ct. at 1550 n.17. Assuming that it could, however, the Court said that the record did not identify any specific risks to counsel in that case. *Id.* at 901, 104 S. Ct. at 1550. Accordingly, the Court vacated the portion of the district court's order enhancing the plaintiffs' fees award. *Id.* at 901-02, 104 S. Ct. at 1550.

The Court's next "reasonable fee" case was *Delaware Valley I*.[4] The district court had enhanced the

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[4] In *Delaware Valley I*, the Court reviewed an attorneys' fees award that was ordered pursuant to the Clean Air Act § 304(d), 42 U.S.C. § 7604(d). *Delaware Valley I*, 478 U.S. at 557, 106 S. Ct. at 3094. The Court held that "[g]iven the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner."

(Continued on following page)

plaintiffs' lodestar calculation in that case because of the contingent nature of the fee and the quality of counsel's work "which culminated in an outstanding result." *Delaware Valley I*, 478 U.S. at 555, 106 S. Ct. at 3093 (quotation omitted). As it had done in *Blum*, the *Delaware Valley I* Court reviewed the district court's reasons for enhancing the fee award and found all of them wanting. This time the Court did not just say that there's a presumption, but emphasized that there is a "strong presumption" that the lodestar figure represents the reasonable fee. *Id.* at 565, 106 S. Ct. at 3098. The Court explained the basis for that strong presumption:

> A strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from

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Id. at 560, 106 S. Ct. at 3096. *Delaware Valley I* has been applied to § 1988 cases by this Court, as well. *See, e.g., Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1298-99 (11th Cir. 1988).

> the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-shifting statute has been satisfied.

Id.

The Court in *Delaware Valley I* closed some doors for enhancements that it had left ajar in earlier cases. It held that the strong presumption that the lodestar figure is the amount to be awarded – the presumption against enhancements – cannot be overcome by the special skill and experience of counsel, the quality of representation, or the results obtained. *Id.* Those factors, the Court reasoned, "are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Id.* This is the Court's reasoning:

> [W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.

> In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Id. at 565-66, 106 S. Ct. at 3098. Not using the overall quality of performance to enhance the fee removes "any danger of 'double counting.'" *Id.* at 566, 106 S. Ct. at 3099.

The *Delaware Valley I* Court reversed the enhancement part of the fee award insofar as the enhancement was based on the quality of the attorney's work and the outstanding result obtained. *Id.* at 568, 106 S. Ct. at 3099-100. It left undecided the question of whether the enhancement was proper insofar as it was based on the contingency nature of the fee – the risk that the attorneys would lose the case and receive no fees. That issue was to be reargued in the same case the next term, *id.*, 106 S. Ct. at 3100, but that attempt to decide it misfired when the Court fractured, with no opinion garnering a majority vote, *see Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078 (1987) (*Delaware Valley II*).

It was not until five years later, after the membership of the Court had changed, that the contingency issue was definitively resolved. In *Dague* the Court squarely rejected the proposition that a court "may enhance the fee award above the 'lodestar'

amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services." *Dague,* 505 U.S. at 559, 112 S. Ct. at 2639.[5] The Court reasoned that an enhancement for contingency would duplicate in substantial part factors that had already been considered in arriving at the lodestar. It explained that "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *Id.* at 562, 112 S. Ct. at 2641.

The second factor, the Court said, is "ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* "Taking account of it again through lodestar enhancement amounts to double counting." *Id.* at 563, 112 S. Ct. at 2641.

The Court recognized that, unlike the second contingency factor, the first one – the relative merits

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[5] The fees in *Dague* were awarded pursuant to the Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6972(e), and the Clean Water Act § 505(d), 33 U.S.C. § 1365(d). *Dague,* 505 U.S. at 559, 112 S. Ct. at 2639. As it had in *Delaware Valley I,* the *Dague* Court held that the language of these attorneys' fees statutes are "similar to that of many other federal fee-shifting statutes; our case law construing what is a 'reasonable' fee applies uniformly to all of them." *Id.* at 562, 112 S. Ct. at 2641 (citing 42 U.S.C. § 1988).

of the claim – is not taken into consideration in determining the lodestar figure. That is no problem, the Court decided, because the relative merits of the claim "should play no part in the calculation of the award." *Id.* For one thing, there is always a risk that a case will be lost – "no claim has a 100% chance of success." *Id.* As a result, permitting adjustments based on risk would mean that the "computation of the lodestar would never end the court's inquiry in contingent-fee cases." *Id.* That would contradict the Court's repeated instruction that there is a strong presumption that the lodestar is the fee to be awarded and adjustments to it are to be the rare exception, not the general rule.

Not only that, the Court said, but awarding enhancements based on the financial risk in taking the case would also "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." *Id.* The "social cost of indiscriminately encouraging nonmeritorious claims" would be too high, and encouraging attorneys to take less meritorious cases is "an unlikely objective of the 'reasonable fees' provisions." *Id.* at 563, 112 S. Ct. at 2642. Accordingly, the Court concluded that a contingency enhancement is "not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee." *Id.* at 566, 112 S. Ct. at 2643. The Court in *Dague* did not merely reverse the application of a contingency or risk enhancement in that case, but also ruled out one in any case, "concluding that

no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Id.* at 565, 112 S. Ct. at 2643.

The *Dague* decision is the last word we have from the Supreme Court on the issue of whether, and if so when, the lodestar amount may be enhanced in calculating the attorneys' fees under one of the federal fee-shifting statutes.

B.

The district court's $4.5 million enhancement to the $6 million lodestar figure in the present case cannot be squared with the Supreme Court decisions we have discussed. The district court did not explicitly mention, much less give full effect to, the strong presumption that the lodestar amount is a reasonable fee and therefore the fee to be awarded. *See Dague,* 505 U.S. at 562, 112 S. Ct. at 2641 ("We have established a strong presumption that the lodestar represents the reasonable fee, and have placed upon the fee applicant who seeks more than that the burden of showing that such an adjustment is *necessary* to the determination of a reasonable fee." (quotation and citation omitted)); *Delaware Valley I,* 478 U.S. at 565, 106 S. Ct. at 3098 ("A strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case.").

The district court relied on several factors in granting the multi-million dollar enhancement to the lodestar figure, most of which are cited in the following passage from its opinion:

> First, the evidence establishes that the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation. Specifically, the evidence shows that the hourly rates used in the lodestar calculation do not take into account (1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.FN8 (Chandler Decl. ¶¶ 5-8; Fellows Decl. ¶¶ 5-8; Knowles Decl. ¶¶ 7-12; Rawls Decl. ¶¶ 5-8; Lowry Decl. ¶ 25; Bramlett Decl. ¶¶ 7(a) & 10, 13-14.)
>
> FN8. A lodestar enhancement cannot be based on contingency alone. *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638 (1992). In this case, however, the risk of non-recovery is only one of several factors which, taken together, establish

> a level of service well beyond what could reasonably be expected for the rates claimed.

Kenny A., 454 F. Supp. 2d at 1288 (citations omitted). None of the three factors the district court relied on in that passage to justify boosting the award is a proper basis for doing so.

1.

Starting from the end of the list, the district court's reliance on the quality of service and superior performance, which are essentially the same thing, conflicts with the Supreme Court's teachings that those considerations are adequately accounted for "either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rates," and that it is "unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Delaware Valley I*, 478 U.S. at 565-66, 106 S. Ct. at 3098; *see also id.* at 565, 106 S. Ct. at 3098 ("Hence, if plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied."). In this case, the district court specifically considered "the stellar performance of plaintiffs' counsel throughout this long and difficult case" in approving their hourly rates, which reached $450 and $495 for lead counsel. *Kenny A. III*, 454 F. Supp. 2d at 1284, 1286. Having already been used to increase the

lodestar amount, the quality of the services rendered and superior performance could not also be used to enhance the lodestar amount that had been calculated using those higher rates. *See Delaware Valley I*, 478 U.S. at 565, 106 S. Ct. at 3098. Double counting simply is not allowed.

It was after the successful settlement had been achieved, after they knew how well they had performed, after they knew the degree of difficulty involved, and after they knew how much capital resources and legal effort had been required that the plaintiffs' attorneys asked for hourly rates they thought that they deserved. Over the objections of the defendants, the district court gave them those rates in full. It did not reduce a single hourly rate for any attorney or paralegal by so much as a penny.[6]

In requesting their hourly rates, the lead counsel for the plaintiffs represented that those rates were adequate, subject to considerations they specified, to compensate them. Marcia Robinson Lowry, one of the two lead counsel, testified by affidavit that:

> The standard hourly rates reflected in Exhibit 2 are fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable

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[6] The district court did cut the hourly rates for travel time in half, but not in order to lower the rates. Instead, the reduction was the court's way of correcting for the attorneys' excessive billing of time. *Kenny A. III*, 454 F. Supp. 2d at 1284.

> quality rendered in cases demanding similar skill, judgment and performance. These standard hourly rates do not, however, take into account the fact that class counsel was required in this case to advance the entire $1.7 million expense of prosecuting this case for the benefit of the class, or the fact that class counsel's compensation was totally contingent upon prevailing in this action.

Jeffrey O. Bramlett, the other lead counsel, testified by affidavit that: "The hourly rates set forth in Exhibit 1 correctly reflect the hourly rates my law firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis." However, he further testified:

> Standard Hourly Rates are predicated on the assumptions that the client will pay in full on a 30-60 day cycle, that counsel is not required to shoulder any significant financial risk of unreimbursed case expense, and that counsel will be paid currently regardless of the result ultimately achieved. Here, Class Counsel was forced to advance case expenses approaching $1.7 million to protect the Class' interests, largely because State Defendants refused Plaintiffs' suggestion of a neutral case record review that would have saved both sides (and ultimately the State) duplicative cost. Here, Class Counsel was forced to personally advance Plaintiffs' portion of that cost in the face of State Defendants' vigorous assertion that it would not and could not be recovered. Here,

> Class Counsel's recovery of any cost, let alone fee, was utterly dependent upon the contingency of a successful result. Here, Class Counsel was forced to invest more than $8.85 million of professional time and out-of-pocket expense over a three-and-one-half year period with no assurance of any recovery.

There is no indication that Mr. Bramlett's firm's regular hourly rates are anywhere near the low side of the Atlanta legal market or even the midpoint.

The position that the two lead counsel took in their affidavits is that the hourly rates used to calculate the lodestar figure were the same rates paying clients would have been charged. They each represented that those rates would fully compensate them except for three facts that the district court listed in its opinion: "(1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an ongoing basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case." *Kenny A. III*, 454 F. Supp. 2d at 1288.

2.

The first two of those three considerations are delayed payment factors, and if they were permissible bases for enhancing a fee award, an enhancement

would be required in virtually every class action covered by one of the traditional federal fee-shifting statutes. It is a rare § 1983 action where those whose rights have been violated finance the cost of the litigation. Attorneys for the plaintiffs in these types of cases almost always have to advance the cost of the litigation and do not receive any payment for their time until the case is completed. That is simply the nature of the beast. If the delays in reimbursement for costs and payment for services that these cases inevitably entail justified enhancement, there would be an enhancement in almost every case. We know that cannot be, because the Supreme Court has instructed us that we must employ a strong presumption against enhancements and confine them to the rare and exceptional case. *Dague*, 505 U.S. at 562, 112 S. Ct. at 2641; *Delaware Valley I*, 478 U.S. at 565, 106 S. Ct. at 3098.

Particularly instructive on this point is some of the Supreme Court's reasoning in concluding that there could be no enhancement for the contingency nature of a case – for the risk that the plaintiffs would not be paid at all for the costs they advanced and the time they expended. *See Dague*, 505 U.S. at 563, 112 S. Ct. at 2641. Because there is always a risk that a case will be lost, permitting enhancements based on the degree of risk would mean that calculation of the lodestar would never end the inquiry in a contingent-fee case, and that, the Court decided, would be unacceptable. *Id.* Likewise, permitting enhancements for the delay in compensation for

expenses incurred and services rendered would mean that calculation of the lodestar would be merely the first step, not the presumptive last step in the process. That would be unacceptable.

Finally, we have said that any delay in payment for professional services rendered is offset by the fact that the hourly rates used are those that prevail at the completion of the case instead of the usually lower rates that were in effect at the time the earlier work was done. *See Norman*, 836 F.2d at 1302 ("[W]here there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates."). In this case, as in most, the hourly rates used were those in effect after the case had been completed. (*See* R32:495-Ex.C:¶6) ("The hourly rates set forth in Exhibit 1 correctly reflect the hourly rates my firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis."). That covers two of the three factors the district court relied on in determining that the hourly rates were underinclusive and an enhancement was warranted. *Kenny A. III*, 454 F. Supp. 2d at 1288.

3.

The third factor was the contingent nature of the case. Enhancing a lodestar based on contingency is flatly forbidden by the *Dague* decision. The district court was under the mistaken impression that the

Dague rule forbids only an enhancement based on contingency alone. *Id.* at 1288 n.8. The rule is not so limited. The Supreme Court's description of the scope of its holding leaves no wiggle room. The Court stated that it was "concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Dague*, 505 U.S. at 565, 112 S. Ct. at 2643. In case anyone missed the point of that, the Court unequivocally stated in the penultimate sentence of its opinion: "[W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue." *Id.* at 567, 112 S. Ct. at 2643-44. Period.

Even if we were to go beyond that clear language of the Supreme Court's command, the reasons it gave for concluding that contingency enhancements are incompatible with the fee-shifting statutes apply with equal force to using contingency as one of several reasons for an enhancement. For example, taking the risk of loss into account both in the lodestar and in an enhancement amounts to double counting the difficulty of the case, *id.* at 562-63, 112 S. Ct. at 2641, regardless of whether contingency is the sole enhancement factor. No double counting means no double counting. Allowing contingency to figure into an enhancement to any extent would also provide attorneys with an incentive to bring relatively meritless claims. *See id.* at 563, 112 S. Ct. at 2642; *see also id.* at 566, 112 S. Ct. at 2643 ("Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence

more litigable."). That, the Court reasoned, would be bad. *Dague,* 505 U.S. at 566, 112 S. Ct. at 2643.

In summary, none of the three factors that the district court enumerated as a basis for determining that the professional services rendered by plaintiffs' counsel were "far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation," *Kenny A. III,* 454 F. Supp. 2d at 1288, is a permissible basis for enhancing the lodestar amount. An enhancement based on them is inconsistent with controlling Supreme Court decisions.

4.

Making a further attempt to justify the enhancement, the district court also stated that:

> In addition, based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar. Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled

> legal representation, and the Court would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients.

Id. at 1288-89. This rationale is little more than a restatement of the district court's position that the lodestar amount should be enhanced because of the quality of the representation. Two points about that.

First, the district court itself found that plaintiffs' attorneys had submitted vague records and overbilled in eight of fifteen categories, forcing the court to cut more than 4,700 hours off those they claimed, amounting to a reduction of more than $1 million of billable time. *See supra* at 10-11. And, as we have indicated, if anything, the district court was too kind to plaintiffs' attorneys in that respect. *See supra* at 15-17. Any kindness aside, in *Delaware Valley I* the Supreme Court held that the "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Delaware Valley I*, 478 U.S. at 567, 106 S. Ct. at 3099; *see generally id.* at 554 n.2, 106 S. Ct. at 3093 n.2. The holding reflects the common sense idea that bad and excessive billing is inconsistent with superb lawyering. The district court failed to consider that inconsistency in its findings.

The second, and more fundamental, point about the district court's reliance on the quality of the

representation as a ground for enhancing the lodestar amount is that it amounts to double counting and is contrary to the Supreme Court's decision in *Delaware Valley I*. As we have already explained, in that decision the Court reversed an enhancement for superior performance, holding that "the special skill and experience of counsel" and "the quality of representation" are "presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Delaware Valley I*, 478 U.S. at 565, 106 S. Ct. at 3098 (quotation and citation omitted); *see also id.* at 566, 106 S. Ct. at 3098 ("In short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and *it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.*" (emphasis added)).[7]

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[7] The Court in *Delaware Valley I* also said that "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" *Delaware Valley I*, 478 U.S. at 566, 106 S. Ct. at 3099. Judge Wilson's concurring opinion reads the words "normally" and "ordinarily" to eviscerate the Court's clear instruction that "it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Id.* That reading, which infers too much from two words, would license courts to award enhancements for superior performance or results in any case where the performance or result was anything better than "ordinary" or "normal," thereby contradicting the Court's clear

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The final reason the district court gave for the $4.5 million enhancement was that "plaintiffs' success in this case was truly exceptional." *Kenny A. III,* 454 F. Supp. 2d at 1289. The result was so good, the court said, that: "After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290. Not only that, but the district court also said that "even if the plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." *Id.* at 1289-90.

To the extent that the district court rewarded plaintiffs' counsel with an enhancement for obtaining better results than the class would have received had the case been resolved on the merits, that is plainly wrong. The purpose of the fee-shifting statutes, as the Supreme Court explained in *Delaware Valley I,* is "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Delaware Valley I,* 478 U.S. at 565, 106 S. Ct. at 3098. The statutes are designed to ensure that civil rights

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instruction that there is a strong presumption against an enhancement for any reason and that they should rarely be granted for any reason. *Id.* at 565, 106 S. Ct. at 3098. That reading would also be inconsistent with much of what the Court has said on the subject, contradicting, for example, the clear implication of the Court's later teachings in the *Dague* case. *See infra* at 40-42.

plaintiffs are adequately represented by counsel. *See Hensley*, 461 U.S. at 429, 103 S. Ct. at 1937 ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. Rep. No. 94-1558, at 1 (1976))). For that reason, a fee award should "result[ ] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum*, 465 U.S. at 893-94, 104 S. Ct. at 1546 (quoting S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.A.A.N. [sic] 5908, 5913).

Stated from the other direction, the fee-shifting statutes are not designed to provide representation that will win plaintiffs more than a correct application of substantive and remedial law entitles them to receive. Their purpose is not to provide representation that will secure settlement relief that is more "intricately detailed and comprehensive," *Kenny A. III*, 454 F. Supp. 2d at 1289-90, than the plaintiffs would have received if their claims had been litigated to final judgment. The purpose of the statutes, most assuredly, is not to provide plaintiffs with representation that dazzles or bedazzles the district court judge. Fee awards should be calculated in a way that furthers the purpose of the fee-shifting statutes; they should not be used to encourage or reward results that go beyond that purpose. *See Blum*, 465 U.S. at 893-95, 104 S. Ct. at 1546-47.

Some of the discussion in the *Dague* opinion is useful in understanding why enhancements should not be given for merits-exceeding results. As we have

recounted, in that case the Supreme Court rejected the idea of enhancements for contingency or risk of loss in part because permitting them would provide attorneys with some incentive to bring relatively meritless claims. *Dague,* 505 U.S. at 563, 112 S. Ct. at 2641-42. The social cost of encouraging attorneys to press claims of dubious merit would be too high, the Court reasoned, and providing attorneys with incentives to bring them is "an unlikely objective of the 'reasonable fees' provision." *Id.* at 563, 112 S. Ct. at 2643.

A result that obtains more or better relief than plaintiffs are entitled to receive under the law is, to the extent it exceeds their entitlement on the merits, analogous to relief on a meritless claim. Just as *Dague* instructs us that fee awards should not underwrite efforts to obtain relief where none is due under the law, neither should they underwrite efforts to receive more or better relief than that due under the law. Just as the societal costs for fee awards for non-meritorious claims are too high, so also are they too high for results that exceed what the law allows. Just as encouraging non-meritorious claims cannot have been an objective of the fee-shifting provisions, neither can encouraging results that go beyond what the law allows have been an objective.

To put it in an either-or manner, superb results are either what a fair application of the law produces, which means that they are not truly "superb," or they are results that exceed what the law allows and for that reason are beyond the purpose of the fee-shifting

statutes. Those statutes are designed to provide a reasonable fee for a reasonable result, not an extraordinary fee for a result that goes beyond what the law would provide if the claims were litigated to their correct conclusion on the merits.

Look at it this way. A merits-exceeding result for plaintiffs must be the product of one, or some combination, of the following factors: superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck. The Supreme Court held in *Delaware Valley I* that superior lawyering by the plaintiffs' counsel is not a proper basis for an enhancement. *Delaware Valley I*, 478 U.S. at 565-68, 106 S. Ct. at 3098-100. So, the first possible cause of results that go beyond the merits cannot be used to justify an enhancement. Nor can it plausibly be argued that plaintiffs' attorneys ought to reap a windfall, and defendants ought to have to pay more in fees than they otherwise should, because of bad lawyering on the defense side. Surely a defendant suffers enough from the additional relief granted against it because of inferior representation without making the defendant pay a surcharge to the other side for the privilege of having been the victim of bad lawyering. Nor can it be argued, with tongue out of cheek, that fees should be increased to reward plaintiffs' attorneys for being on the side that happens to benefit from bad judging or good luck. That exhausts the possible explanations for excessively favorable results, and none supports awarding an enhancement.

5.

The district court relied to some extent on four of the five affidavits that the plaintiffs' attorneys in this case obtained from their friends who do similar work. *Kenny A. III*, 454 F. Supp. 2d at 1290.[8] The district court found that the affiants were "disinterested Atlanta attorneys." *Id.* That finding is clearly erroneous. At oral argument, one of the two lead counsel for the plaintiffs conceded that he not only had recruited these attorneys to provide the affidavits but that in the past he had also supplied some of them with similar affidavits to help boost their own fee awards.[9]

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[8] It is unclear why, in its discussion of the affidavits, the district court omitted any discussion of the one signed by Ralph Goldberg. *See Kenny A. III*, 454 F. Supp. 2d at 1290. For the sake of completeness, we will include it in our discussion.

Four of the five affidavits indicate that they are from attorneys who practice regularly as plaintiffs' lawyers depending on attorneys' fee awards. The lone exception is John Chandler, whose affidavit indicates that although most of his work has been on the defense side he has also served as counsel for some plaintiffs' classes.

[9] Court: Who selected those lawyers who served as experts?

Bramlett: I sought those witnesses out. I mean the Court didn't say -

Court: I would be shocked if you told me you had never filed an affidavit for one of them.

Bramlett: You would be shocked and that would be incorrect. But, but the fact is that all four of these lawyers are highly experienced, highly competent, have practiced law in the Atlanta market -

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Aside from the need to support those who support them, the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible. The higher this fee award is the more useful it will be as precedent for the lawyer signing the affidavit when he seeks a high fee award in his own cases. The affiants are anything but "disinterested."[10]

The lodestar amount will never suffice for attorneys who practice in this area. They will always believe, in all sincerity, that they deserve more and that the justice system will function better if they are paid more. Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members

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Court: And highly interested in keeping the rates up and the multipliers as high as possible –

Bramlett: Ah.

[10] The concurring opinion states that "[i]t cannot be reasonably contended that the able and experienced district judge in this case never considered the possibility that the affiants . . . could derive an indirect benefit from the precedential value of a high fee award." *See infra* at 83-84 (Wilson, J., concurring specially). Actually, the able and experienced district court judge himself explicitly found that the affiant attorneys were "disinterested." That finding, which underlay any credit the court gave to the affidavits, is clearly erroneous. It just is not true.

of the group are to be paid. *Cf.* H.L. Mencken, *A Little Book in C Major* 22 (John Lane Co. 1916) ("It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.").

Aside from the obvious self-interest of the affiants, the contents of the affidavits that were filed in this case are also flawed in other ways. For example, in each of them the affiant solemnly swore that the amount of compensable time claimed in this case was "reasonable,"[11] was "reasonable, fair, and fully compensable,"[12] or was "fair, reasonable, and fully deserving of adequate and full compensation."[13] Yet, we know those assertions are not true. As we have already noted, the district court found that plaintiffs had inflated the number of hours for which they were due compensation in most of the fifteen billing categories and by a substantial amount. *Kenny A. III,* 454 F. Supp. 2d at 1274-84, 1286; *supra* at 10-11. The court's finding, which is being affirmed by this Court, that the hours submitted were not reasonable contradicts a key premise in every one of the lawyer affiants.

All five of the affidavits urged the district court to enhance the fee award based on the fact that

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[11] (R32:495:Ex.F:4) (affidavit of John Chandler); (R32:495:Ex.G:4) (affidavit of Henry D. Fellows, Jr.); (R32:495:Ex.H:4) (affidavit of James C. Rawls).

[12] (R32:495:Ex.E:4-5) (affidavit of Ralph Goldberg).

[13] (R32:495:Ex.D:5) (affidavit of Ralph I. Knowles, Jr.) (emphasis omitted).

plaintiffs' counsel advanced the cost of expenses.[14] That is not a permissible basis for an enhancement. *See supra* at 32-34. All of the affidavits urged the court to enhance the fee award because of the risk or contingency factor.[15] That, too, is an impermissible factor for an enhancement, as the concurring opinion in this case concedes. *See infra* at 82 (Wilson, J., concurring specially). The Supreme Court itself has specifically ruled it out. *See supra* at 34-36. Four of the affidavits even urged the court to base its fee award on the common fund or common benefit doctrines,[16] which the district court correctly concluded was not legally permissible or even possible. *See Kenny A. III,* 454 F. Supp. 2d at 1270-72; *supra* at 14. The fact that the opinions expressed in all five of the affidavits were based on consideration of several improper factors makes any finding of the district court based on the affidavits clearly erroneous, and it

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[14] (R32:495:Ex.D:6-8, 11) (affidavit of Ralph I. Knowles, Jr.); (R32:495:Ex.E:5-6) (affidavit of Ralph Goldberg); (R32:495:Ex.F:4-5) (affidavit of John Chandler); (R32:495:Ex.G:4-5) (affidavit of Henry D. Fellows, Jr.); (R32:495:Ex.H:4-5) (affidavit of James C. Rawls).

[15] (R32:495:Ex.D:6-8, 11) (affidavit of Ralph I. Knowles, Jr.); (R32:495:Ex.E:5-6) (affidavit of Ralph Goldberg); (R32:495:Ex.F:4-5) (affidavit of John Chandler); (R32:495:Ex.G:4-5) (affidavit of Henry D. Fellows, Jr.); (R32:495:Ex.H:4-5) (affidavit of James C. Rawls).

[16] (R32:495:Ex.D:8) (affidavit of Ralph I. Knowles, Jr.); (R32:495:Ex.F:5) (affidavit of John Chandler); (R32:495:Ex.G:4-5) (affidavit of Henry D. Fellows, Jr.); (R32:495:Ex.H:5) (affidavit of James C. Rawls).

renders any reliance the court placed on those affidavits an abuse of discretion. As we have recognized, "[i]t would be a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *McNair v. Allen,* 515 F.3d 1168, 1173 (11th Cir. 2008) (internal marks omitted) (quoting *Schlup v. Delo,* 513 U.S. at 333, 115 S. Ct. at 870 (O'Connor, J., concurring)); *see also Koon,* 518 U.S. at 100, 116 S. Ct. at 2047 ("A district court by definition abuses its discretion when it makes an error of law."); *United States v. Hall,* 349 F.3d 1320, 1323 (11th Cir. 2003) (explaining that if a district court decision is "based on an error of law, then it is by definition an abuse of discretion"). It is no less an abuse of discretion for a district court to base its decision on affidavits that are themselves based on legally erroneous assumptions.

Were it otherwise, there would be no end to enhancements and no limit to them. In every case where an established member of the Bar seeks an enhancement he will be able to get his colleagues who are interested in keeping fee awards as high as possible to sign affidavits stating that the only thing that will ensure adequate representation in cases like that one is a multi-million dollar enhancement. And some district court judges will credit those interested affiants as "disinterested attorneys."

But none of this and none of the multiple, specific, and serious defects in the affidavits that were filed in this case should obscure the more fundamental point, which is that enhancements for superior

performance and results are not permissible, no matter how much the interested members of this particular segment of the Bar might want them to be. *See supra* at 36-42. Supreme Court decisions cannot be overruled by affidavits.

6.

Our conclusion that the enhancement to the lodestar amount in this case was improper does not mean that one will never be appropriate under any circumstances. If, as the Supreme Court has instructed us, the proper calculation of the lodestar amount leaves "very little room" for enhancements, which may be proper only in "rare" and "exceptional" cases, *Delaware Valley I*, 478 U.S. at 565-66, 106 S. Ct. at 3098, where is that little room – and what are those rare and exceptional cases that may fit within it? We can think of some.

Suppose, for example, that an attorney's representation vindicates the federal rights of an unpopular client and as a result that attorney suffers a loss of standing in the community which damages his practice and income. The kind of situation we have in mind was discussed by Judge Frank M. Johnson, Jr., albeit not on the issue of enhancing a lodestar amount. Actually, the discussion came before the enactment of the § 1988 fee-shifting statute and was in the context of deciding the amount of fees that should be awarded by the court through the exercise of its equitable power. *NAACP v. Allen*, 340 F. Supp.

703 (M.D. Ala. 1972), *aff'd in relevant part*, 493 F.2d 614 (5th Cir. 1974). In deciding how much the attorney should receive, Judge Johnson stated:

> [A] lawyer representing black plaintiffs in an employment discrimination case, or in any civil rights litigation, is likely to suffer social, political and community ostracism. This likelihood is multiplied, of course, in a case such as the present one in which plaintiffs have sued high-ranking state officials and have alleged and proved racial discrimination. Even more damaging to an attorney involved in such litigation is the probability that he will be estranged from other members of his profession who are unwilling to participate in, or even lend moral support to, suits seeking to vindicate the public good.

Id. at 710.

We hope that three-and-a-half decades after those words were written in the *Allen* case attorneys who represent victims of racial discrimination no longer suffer social, political, or professional ostracism. But attorneys who represent other types of plaintiffs might. It could happen to an attorney who represents a pedophile attacking a sexual offender registration law on Due Process grounds, or perhaps to an attorney in a small Bible Belt town who succeeds in having a popular public religious practice enjoined as contrary to the Establishment Clause. Whether those circumstances, and others we have not mentioned, would be proper ones for enhancing the

lodestar amount are issues for other days. For now it is enough to recognize the possibility and to point out that the "rare" and "exceptional" circumstances that we have mentioned would be more likely to fit within the "very little room" that the Supreme Court has told us is left for enhancements. *Delaware Valley I*, 478 U.S. at 565-66, 106 S. Ct. at 3098. The Supreme Court decisions on fee-shifting do not clearly preclude an enhancement of the lodestar amount in those circumstances. And an enhancement in those circumstances is less likely to result in double counting, or to encourage meritless lawsuits, or to go beyond the basic purpose of the fee-shifting statutes than the enhancement that the district court awarded in this case does.

Representing children who find themselves in foster care is not the same as representing activist atheists in the Bible Belt or pedophiles anywhere. The plaintiffs' attorneys in this case do not, and reasonably could not, claim to have suffered any social or professional ostracism, nor do they contend that their victory here will somehow damage their legal practice. To the contrary, vindicating the rights of helpless children is the kind of accomplishment that brings professional accolades and enhances one's standing in the community. It is to that type of enhancement, instead of a monetary one, that the attorneys must look for any satisfaction beyond the $6,012,802.90 they are already receiving for their work in this case.

And Mr. Bramlett, for one, has done so. The "Attorney Profile" on his law firm's website boasted of his "track record of results in class action litigation," listing three of his biggest successes.[17] The one that was discussed the most was described as follows:

> Prosecution of class action in conjunction with New York's Children's Rights, Inc. resulting in systematic reform of State of Georgia's dysfunctional foster care system and establishing that foster children have a right to counsel.
>
> The federal judge who presided over the case for Georgia's foster children wrote of the work performed by the legal team led by Jeff and Marcia Robinson Lowry of New York's Childrens' Rights, Inc.: "[P]laintiffs' counsel brought a higher degree of skill, commitment, dedication and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench. . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." 454 F. Supp. 2d at 1289-90.[18]

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[17] Bondurant, Mixson & Elmore LLP, Jeffrey O. Bramlett Attorney Profile, http://www.atlantageorgiatriallawyers.com/attorneys/business_torts_lawyer_bramlett.html (last visited Dec. 8, 2007).

[18] Bondurant, Mixson & Elmore LLP, Jeffrey O. Bramlett Attorney Profile, http://www.atlantageorgiatriallawyers.com/

(Continued on following page)

The profile also recounted that Mr. Bramlett received the Elbert P. Tuttle Jurisprudence Award from the Anti-Defamation League "for dedication to justice and fair treatment for all people."[19] He received that award in 2007 and he was also chosen as President-elect of the Georgia State Bar that same year.[20] Those honors came the year after the judgment that he helped secure was entered in this lawsuit. It appears that, if anything, Mr. Bramlett's professional standing and prestige, as well as his earning ability, have been enhanced as a result of his service as one of the lead counsel for the foster children.

The other co-lead counsel for the foster children in this case has not suffered any reduction in professional standing or livelihood because of her work in it, either. To the contrary, what she did in this case has furthered her credentials, her reputation, her chosen lifework, and the purpose of her organization. Marcia Robinson Lowry has litigated on behalf of children's welfare for more than a quarter of a century. She has "directed major litigation efforts in jurisdictions

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attorneys/business_torts_lawyer_bramlett.html (last visited Dec. 8, 2007).

[19] Bondurant, Mixson & Elmore LLP, Jeffrey O. Bramlett Attorney Profile, http://www.atlantageorgiatriallawyers.com/attorneys/business_torts_lawyer_bramlett.html (last visited Dec. 8, 2007).

[20] Bondurant, Mixson & Elmore LLP, Jeffrey O. Bramlett Attorney Profile, http://www.atlantageorgiatriallawyers.com/attorneys/business_torts_lawyer_bramlett.html (last visited Dec. 8, 2007).

throughout the United States designed to promote major reform of child welfare systems." (R32:495:Ex.B:2.)

Ms. Lowry founded and is the Executive Director of the Children's Rights Group, a non-profit organization that advocates and litigates on behalf of children. The organization's website explains that, among other things, "Children's Rights files class action lawsuits on behalf of classes of abused and neglected children who have contact with public child welfare systems, to enforce their legal rights. The goal of these lawsuits is to improve the functioning of state child welfare systems. . . ."[21]

As with any organization that is largely dependent upon donations and grants, Children's Rights cannot afford to hide its achievements, and it has not been shy about what it achieved in this case. In at least four press releases over the course of the lawsuit, Children's Rights trumpeted what it had done and was doing for "some of Atlanta's most vulnerable citizens,"[22] and it proudly proclaimed that "[a]fter so

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[21] Children's Rights, Frequently Asked Questions, http://www.childrensrights.org/site/PageServer?pagename=faq#Lawsuit (last visited June 5, 2008).

[22] Press Release, Children's Rights, New Settlement Guarantees the Right to Legal Counsel for Abused and Neglected Children in DeKalb County, Georgia, http://www.childrensrights.org/pdfs/press_releases/DeKalbCountySettle3720231.pdf (last visited June 5, 2008)

many years of failure and broken promises by the state, this lawsuit has given these abused and neglected children a voice."[23] The organization described one of the district court's rulings as "a landmark decision nationally and a huge victory for the rights of abused and neglected children."[24] It later referred to the "groundbreaking settlement agreement" in the case, adding that the agreement "appears to be the first of its kind nationally, and we expect that children throughout Georgia and perhaps elsewhere in the country will benefit."[25] The accomplishments of Children's Rights in this case were discussed in its annual report: "In 2006-2007, we took the fight for America's abused and neglected children" to eight

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[23] Press Release, Children's Rights, Settlement of Class-Action Lawsuit Mandates Sweeping Reform of Foster Care in Atlanta, Georgia (July 5, 2005), http://www.childrensrights.org/pdfs/press_releases/07-05-05.pdf (last visited June 5, 2008).

[24] Press Release, Children's Rights, Inc., In First Ruling of its Kind in Nation, Federal Judge in Georgia Rules Abused and Neglected Children Have Right to an Attorney While in State Custody (Feb. 8, 2005), *at* http://www.childrensrights.org/pdfs/press_releases/02-08-05.pdf (last visited June 5, 2008).

[25] Press Release, Children's Rights, Inc., Landmark Settlement Guarantees the Right to Legal Counsel for Abused and Neglected Children in Atlanta, Georgia (Feb. 13, 2006), *at* http://www.childrensrights.org/pdfs/press_releases/3197_001.pdf (last visited June 5, 2008).

states.[26] Georgia is listed in the report as one of the eight states where Children's Rights took "the fight."[27]

The point is not that Ms. Lowry and her organization don't have every reason to boast about their role in this case. The point is that their work in this case is something that is in their interest to boast about. It is not something that requires more than the $495 per hour that Ms. Lowry received to attract her and her organization to this case. This area of the law is the sea in which they sail and class action lawsuits are their chosen vessel. It is what they do. They submitted three-fourths of the billable hours in this lawsuit. Except for the relatively insignificant travel hours, they were paid at the high hourly rates they demanded. To suggest that the prospect of a huge monetary bonus was needed to attract them to this lawsuit is not only absurd, but it also demeans the dedication of Ms. Lowry and her organization. *Cf. Delaware Valley I*, 478 U.S. at 567, 106 S. Ct. at 3099 ("Clearly, Delaware Valley was able to obtain counsel without any promise of reward for extraordinary performance.").

The multi-million dollar enhancement, over and beyond the full lodestar sum that Ms. Lowry and her

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[26] Children's Rights, Inc., Annual Report, at 4 (2006-2007), http://www.childrensrights.org/pdfs/Annual%20Report%202006-2007.pdf (last visited June 5, 2008).

[27] Children's Rights, Inc., Annual Report, at 5 (2006-2007), http://www.childrensrights.org/pdfs/Annual%20Report%202006-2007.pdf (last visited June 5, 2008).

organization received, amounts to an involuntary, federal court ordered contribution from the taxpayers of Georgia to a non-profit organization. The perverse irony of the seven figure, court ordered gratuity in this case is that it reduces the amount of state funds available to care for what Children's Rights itself has described as some of Georgia's "most vulnerable citizens," the very group that the organization is dedicated to protecting.

For all of the reasons we have discussed, were we free to decide the issue we would readily conclude that the district court's award of a $4,500,000 enhancement to the lodestar amount in this case is an abuse of discretion, because it is based on an erroneous view of the law and reflects a clear error of judgment.

C.

Unfortunately, under the prior panel precedent rule we are not free to decide the enhancement issue, but must instead follow this Court's earlier decisions in *NAACP v. City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). Both of those decisions were issued after the Supreme Court last spoke on the subject of enhancements for quality of representation and superior results, which was in the *Delaware Valley I* case.

In the *NAACP* case, the plaintiffs' attorneys had requested a 50 percent enhancement of the lodestar

amount, which was based, in part, on "the assertion that the relief obtained was of great benefit to the black citizens of Evergreen and represented exceptional success." *NAACP,* 812 F.2d at 1336. After the district court denied the request, the plaintiffs appealed and this Court vacated and remanded, in part because "[t]he district court's opinion does not address at all the last factor that the NAACP argued justified enhancement – that the relief obtained was of great benefit to the black citizens of Evergreen and represented exceptional success." *Id.* In remanding, the Court instructed:

> [T]he district court should make findings with regard to each of the grounds put forward by the NAACP as warranting an enhancement and relate those findings to its ultimate determination of the issue. We note, however, in remanding, that the Supreme Court has held that the fact the results obtained would be of far-reaching significance to a large number of people usually is not grounds for enhancement, because the results obtained, as one of the *Johnson* factors, normally will be subsumed in the calculation of a reasonable fee and, therefore, usually should not provide an independent basis for increasing the fee award. *Blum v. Stenson,* 465 U.S. 886, 900, 104 S. Ct. 1541, 1549-50 (1984). The award may be enhanced, however, "in some cases of exceptional success." *Id.* at 897, 104 S. Ct. at 1548 (quoting *Hensley,* 461 U.S. at 435, 103 S. Ct. at 1940). The district court's reconsideration of the

> appropriateness of an enhancement based on this factor should be made in light of these principles.FN6
>
> > FN6. The basic assumption of *Blum*, however, is that the district court will have taken factors such as the benefit obtained into account in its initial determination of the reasonable fee. There is no indication that the district court has done so in this case. In fact, it appears that the district court limited its consideration of the results obtained to its determination that the prevailing and unsuccessful claims were separable. On remand, the district court should take into account all relevant considerations put forth by the NAACP in determining the effect of the results obtained, as well as the effect of the other *Johnson* factors, on its initial calculation of a reasonable attorney's fee. It should then consider whether the NAACP has shown grounds for an enhancement of that initial calculation.

Norman, 812 F.2d at 1337 & n.6 (citations omitted).

In *Norman* the attorneys for the prevailing civil rights plaintiffs had requested a substantial enhancement of the lodestar amount based in part on the "quality of representation provided." *Norman*, 836 F.2d at 1297. In denying that request the district court found "that substantial results were obtained

even if the lawsuit was unnecessary to obtain them," but that an enhancement was inappropriate "because of the possibility of duplication of efforts and the possibility of improperly charged hours." *Id.* at 1297-98. This Court reversed the denial of the enhancement because "the wrong standards were applied." *Id.* at 1306.

In doing so, the *Norman* Court explained that "[i]f the results obtained were exceptional, then some enhancement of the lodestar might be called for." *Id.* at 1302 (citing *Delaware Valley I,* 478 U.S. at 564-65, 106 S. Ct. at 3098). It also stated that "[e]xceptional results are results that are out of the ordinary, unusual or rare," not those that are expected, because "[t]he law is usually faithful to its teachings, and so an outcome that is not unexpected in the context of extant substantive law will not ordinarily be exceptional." *Id.* These were among the remand instructions in the *Norman* case:

> Any enhancement begins with a finding that the results were exceptional; the district court has also failed to address this issue with reference to the extant substantive law. Accordingly, we remand for reconsideration. In adjusting the lodestar, as has been noted earlier, the court must take into account the significance of the results obtained in relation to those sought. It is at this point that the court may wish to make adjustments for unsuccessful theories and dismissal of the case as to some parties.

> Even if the court found the results obtained to be exceptional, no enhancement for these results would be justified unless the court also finds that class counsel's representation was superior to that which would have been expected considering the rates requested. *Blum*, 465 U.S. at 899, 104 S. Ct. at 1549.

Norman, 836 F.2d at 1306; *accord Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F.3d 1357, 1359 (11th Cir. 2006) (dicta) ("The court may then adjust the lodestar to reach a more appropriate attorney's fee, based on a variety of factors, including the degree of the plaintiff's success in the suit." (footnote omitted)); *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1308 (11th Cir. 2001) (dicta) ("If the court determines that the result obtained was an excellent result, then the award of fees 'will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.'" (citation omitted)); *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996) (dicta) ("After determining the lodestar amount as above, the court is entitled to adjust the amount of final fees awarded in light of the results obtained through the litigation.").

The *NAACP* and *Norman* decisions both vacated district court orders denying enhancements for superior results and issued remand instructions. Those instructions, especially the ones in *Norman*, constitute a holding that superior results coupled with

superior performance can be the basis for an enhancement of the lodestar amount. For the reasons we have already explained at length, we are convinced that holding is wrong and conflicts with relevant Supreme Court decisions.

Nonetheless, as a later panel we are bound to follow it. *Hurth v. Mitchem,* 400 F.3d 857, 862 (11th Cir. 2005) ("[W]e are not permitted to reach a result contrary to a prior panel's decision merely because we are convinced it is wrong. . . ."); *Smith v. GTE Corp.,* 236 F.3d 1292, 1303 (11th Cir. 2001) ("The idea of an exception to the prior panel precedent rule where a subsequent panel is convinced the prior one reached the wrong result – for whatever reason – is also inconsistent with a number of decisions in which panels of this Court have obediently followed prior panel precedents they were convinced were wrong."); *id.* at 1304 ("In summary, the parties' alternative argument boils down to the position that [a decision of this Court] incorrectly interpreted and applied [a Supreme Court decision]. . . . The prior panel precedent rule clearly forecloses their position."); *Wascura v. Carver,* 169 F.3d 683, 687 (11th Cir. 1999) ("Wascura argues that the reasoning of [a decision of this Court] is unclear and inadequate to support its holding. We have no occasion to pass on that criticism, because we are bound by [that] decision regardless of whether we agree with it."); *United States v. Steele,* 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot

overrule a prior one's holding even though convinced it is wrong.").

Our colleague, Judge Wilson, is of the opinion that this Court's decisions in *NAACP* and *Norman* are correct, that enhancements of the lodestar amount can and should be allowed for the quality of representation and the exceptional nature of the results obtained. While we respect those views, we are unpersuaded by them.[28]

The concurring opinion essentially adopts the position of the Sixth Circuit in *Geier v. Sundquist*, 372 F.3d 784 (6th Cir. 2004), that the Supreme Court's holding about performance enhancements in *Delaware Valley I* is nothing but dicta. *Id.* at 794.[29]

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[28] Both Judges Wilson and Hill have authored concurring opinions in this case. *See* n.3, *supra*. References in this opinion to "the concurring opinion" are to Judge Wilson's.

[29] The concurring opinion cites six additional cases from other circuits in support of its position that the district court may enhance the lodestar based on the quality of the representation and superior results: the Second Circuit's decision in *Quaratino v. Tiffany & Co.*, 166 F.3d 422 (2d Cir. 1999), the Fourth Circuit's decision in *Hyatt v. Apfel*, 195 F.3d 188 (4th Cir. 1999), the Fifth Circuit's decision in *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993), the Ninth Circuit's decision in *Van Gerwen v. Guarantee Mutual Life Co.*, 214 F.3d 1041 (9th Cir. 2000), the Eighth Circuit's in *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527 (8th Cir. 1999), and the Tenth Circuit's *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997). There are three problems with reliance on those decisions.

For one thing, none of them actually holds that the lodestar may be enhanced based on the quality of representation. Indeed

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That proposition is a matter of necessity for those who defend enhancements based on superior performance and the results it produces, because what the Court instructed us in the *Delaware Valley I*

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the *Shipes* decision rejected the district court's enhancement on that ground, holding that "[e]ven though Shipes's counsel presented extensive statistical data with competence, nothing less should be expected of counsel; consequently, this factor alone does not support enhancement." *Shipes*, 987 F.2d at 321.

Because the *Quaratino* case did not even involve, directly or indirectly, an enhancement of any type, *Quaratino*, 166 F.3d at 424, anything that opinion says about enhancements is pure dicta. Likewise, the issue before the court in *Van Gerwen* was "whether – and if so, how – a district court may permissibly reduce an attorney's fees award under federal fee-shifting statutes to reflect poor quality of representation." *Van Gerwen*, 214 F.3d at 1044. Because it was a fee reduction case, not an enhancement case, anything the *Van Gerwen* opinion says about enhancements is also dicta. Finally, in *Forshee*, the court of appals [sic] reversed the district court's fee enhancement because it was based on the contingent nature of the case. *Forshee*, 178 F.3d at 532. There was no evidence supporting an enhancement for superior representation or results. The court said: "the case was not unusually difficult or complex to prepare and try, the result while favorable to Forshee was not exceptional, Forshee gave only an impermissible reason for enhancement, and the district court made no 'detailed findings' that would justify an enhanced fee award." *Id.* As with the other two cases, anything the *Forshee* court said about superior representation or results is dicta.

Finally, none of the opinions from other circuits in those six cases engages in an extended discussion of the Supreme Court's *Delaware Valley I* and *Dague* opinions, nor do they confront the Supreme Court's reasoning in those two decisions, reasoning that is inconsistent with enhancements for superior representation and results.

decision is that "it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Delaware Valley I*, 478 U.S. at 566, 106 S. Ct. at 3098. We should not worry about that instruction, *Geier* and the concurring opinion assure us, because it was just a summary of the Court's earlier *Blum* decision, and *Blum* did not say that. In other words, the Supreme Court in *Delaware Valley I* mischaracterized its own earlier decision in *Blum*. That view is wrong for two reasons. The first one, of course, is that the Supreme Court knows its decisions better than we do, and we are not free to disregard the Court's instructions because we think they may be based on a misreading of its own prior decisions.

Secondly, *Geier* and the concurring opinion are also wrong about the context in which the Supreme Court told us in *Delaware Valley I* that enhancements for superior performance and results are unnecessary. That key statement is not confined to a recitation of the *Blum* case. It is part of an additional discussion that follows one in which the Court had stated that the federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys." *Delaware Valley I*, 478 U.S. at 565, 106 S. Ct. at 3098. Instead, the Court explained, the sole purpose of those statutes is to enable "private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Id.* That purpose, the Court emphasized, is satisfied if plaintiffs "find it possible

to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee.'" *Id.*

Immediately after explaining that, in the next paragraph of the *Delaware Valley I* opinion, the Supreme Court made the statements that the concurring opinion and *Geier* would have us disregard. That paragraph, in its entirety, reads as follows:

> Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and *it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.*

Id. at 565-66, 106 S. Ct. at 3098 (emphasis added).

That statement is not dicta. It might have been if the Court had somehow affirmed the fee enhancement for superior performance in *Delaware Valley I*, but the Court did not do that. Instead, the Court

reversed the fee award because of the enhancement, stating in the very next sentence after the quoted paragraph: "With this teaching from our prior cases in mind, we sustain the Commonwealth's contention that the lower courts erred in increasing the fee award to Delaware Valley in Phase V based on the 'superior quality' of counsel's performance." *Id.* at 566, 106 S. Ct. at 3099.[30] The teaching the Supreme Court had in mind included the lesson that it was unnecessary to enhance fees for superior performance. Any additional statements about the particular evidence in that case that come later in the opinion are, at most, additional or alternative holdings. *See id.* at 566, 106 S. Ct. at 3099 ("*Furthermore,* we are unpersuaded that . . . " (emphasis added)).

Even if the first holding stated in the *Delaware Valley I* opinion, which is that fee enhancements for superior performance and exceptional results are unnecessary, is viewed as one of two alternative holdings, we are still required to follow it. *See Massachusetts v. United States*, 333 U.S. 611, 623, 68 S. Ct.

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[30] As we explained earlier in this opinion, the Court carried over for reargument the next term the issue of whether an enhancement for contingency risk was proper. *See Delaware Valley I*, 478 U.S. at 568, 106 S. Ct. at 3100. But the Court did reverse the rest of the enhancement, including the increase for superior performance and exceptional results. *Id.* ("The judgment below is therefore affirmed insofar as it upheld the award of attorney's fees for the work done in Phases II and IX and, *except for the multiplier for risk, is otherwise reversed.*" (emphasis added)).

747, 754 (1948); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340, 48 S. Ct. 194, 196 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."); *Johnson v. DeSoto County Bd. Comm'rs*, 72 F.3d 1556, 1562 (11th Cir. 1996) ("[W]e are bound by alternative holdings"); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925 n.21 (5th Cir. 1977) ("It has long been settled that all alternative rationales for a given result have precedential value."). The concurring opinion, the Sixth Circuit's decision in *Geier*, and our decisions in *NAACP* and *Norman* all disregard the teaching that the Supreme Court used as a basis for its decision in *Delaware Valley I*. They all contradict the Supreme Court's holding that fee enhancements for superior performance and results are unnecessary. We would not, if we were not bound by the prior precedent rule to do so.

The opinions concluding that enhancements for those reasons are appropriate also fail to mention, much less grapple with, the part of the *Dague* decision that discusses enhancements related to the merits of the federal claims that have been vindicated in the lawsuit. As we have already pointed out, *see supra* at 34-35, in the course of rejecting any enhancement to fee awards based on contingency, the Supreme Court unequivocally concluded in *Dague* that enhancements should not be granted based on the legal and factual merits of the claim or the difficulty of establishing those merits. *Dague*, 505 U.S. at

562-63, 112 S. Ct. at 2641. It is logically impossible to reconcile those clear instructions from *Dague* with the position that enhancements can be granted based on the superior performance of counsel in establishing the legal and factual merits. Which may be why *Geier*, *NAACP*, *Norman*, and the concurring opinion make no attempt to do so.[31]

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[31] On a related point, the concurring opinion's reliance on our own decision in *Villano*, is misplaced. The *Villano* case had nothing to do with fee enhancements. Instead, it is a case in which the district court actually reduced the lodestar amount because the plaintiff did not prevail on all claims or against all of the defendants, and did not recover all of the damages he was seeking. *Villano*, 254 F.3d at 1304. The unremarkable holding of *Villano* is that before a court can reduce the lodestar amount for limited success it must consider not just the benefit the plaintiff obtained for himself measured in the damage award but also the public benefit of vindicating federal rights against a governmental entity. *Id.* at 1306-07. Of course.

But to say, as *Villano* does, that a fee award should not be reduced below the lodestar amount for partial success without considering all aspects of the success is one thing. To say, as the concurring opinion in this case does, that the lodestar should be increased for success if the public gained some benefit from having federal rights vindicated is an entirely different thing. Indeed, if public benefit through vindication of federal rights was enough to justify an enhancement of the lodestar amount, there would be an enhancement in every single fee case. There can be no fee award under § 1988 and its statutory cousins unless plaintiff's counsel has obtained a judgment establishing that some federal statutory or constitutional right has been violated. Every judgment that will support a fee award will have benefitted the public by vindicating federal rights and serving as a deterrence to future violations. Therefore, under the concurring opinion's logic, every fee award should be increased as a reward for success and on public benefit grounds. That cannot be.

Despite our disagreement with the concurring opinion about the correctness of our *NAACP* and *Norman* decisions, we do agree that those decisions control the outcome of this case. They do not foreclose us from vacating the district court's judgment based on its improper consideration of the contingency nature of the award, the advancing of expenses, and the delay in payment of fees. However, our reading of the district court's opinion leaves us convinced that it would be pointless to remand to that court with instructions that it reconsider whether to give an enhancement, or the amount of one, free of those improper considerations. The district court was so obviously enamored with the performance of plaintiffs' counsel and with the result that they achieved, and so determined to reward them for it, that we have no doubt the court would simply reinstate the enhancement. So long as our *NAACP* and *Norman* decisions stand, the district court can, and would again on remand, reach the same result that we have before us and rest it on the basis of quality of representation and superior results. All that a remand would achieve is more delay and the generation of more billable hours.

Of course, this Court sitting en banc, or the Supreme Court, can overrule any prior decisions of this Court. Unless and until this Court does overrule *NAACP* and *Norman*, we are constrained to let stand the $4,500,000 enhancement to the lodestar amount that is included in the district court's judgment in this case.

VII.

AFFIRMED.

WILSON, Circuit Judge, specially concurring:

I agree with the decision to uphold the fee award in this case. I do not, however, share my colleague Judge Carnes' view that the district court's decision and our own prior precedents in this area are inconsistent with the teachings of the Supreme Court. The Court has not held that quality of representation and exceptional results can never be grounds for an upward adjustment of the lodestar figure. To the contrary, the Court has allowed for the possibility of an enhancement based on these factors where, as here, specific record evidence indicates that the lodestar amount is insufficient to provide a reasonable fee. Accordingly, I concur in the result only.

I.

In *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984), the Supreme Court considered whether, and under what circumstances, quality of representation and exceptional results can support an enhancement of the lodestar. The Court noted that the quality of an attorney's representation "generally is reflected in the reasonable hourly rate." *Id.* at 899, 104 S. Ct. at 1549. However, the Court stated that this factor may justify an upward adjustment "in the rare case where the fee applicant offers

specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)). Because the attorneys in *Blum* offered no such evidence, the Court concluded that the district court's reliance on quality of representation as grounds for an enhancement amounted to double counting. *Id.* The Court indicated, however, that the outcome would have been different had there been specific evidence showing that an enhancement was necessary to reflect counsel's superior performance. *See id.* at 900, 104 S. Ct. at 1549 ("Absent specific evidence to the contrary, we cannot say that [the] rates . . . for these three attorneys do not fully reflect the quality of their representation.").

With respect to the results obtained, the Court said that this factor likewise will "generally . . . be subsumed within other factors used to calculate a reasonable fee," and therefore "it normally should not provide an independent basis for increasing the fee award." *Id.* at 900, 104 S. Ct. at 1549-50. The Court did not hold, however, that consideration of the results obtained is categorically impermissible. In fact, the Court took the opposite position, reiterating its prior statement from *Hensley*: "[W]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional

success an enhancement award may be justified." *Blum*, 465 U.S. at 901, 104 S. Ct. at 1550 (internal quotation marks omitted) (quoting *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940). Again, the Court indicated that the determinative consideration is whether the record contains evidence "show[ing] that the benefit achieved requires an upward adjustment to the fee." *Id.* at 900, 104 S. Ct. at 1550.

Blum thus establishes that enhancements for quality of representation and exceptional results, while not warranted in most cases, are permissible where supported by specific evidence. Therefore, to accept Judge Carnes' view that these factors can never be grounds for an enhancement, one would have to conclude that the Supreme Court has repudiated that aspect of *Blum*. I find little support for that proposition. Judge Carnes' opinion cites language in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (*Delaware Valley I*), 478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986), that, when read in isolation, arguably characterizes *Blum* as having established a categorical rule against consideration of the quality of representation and the results obtained. *See id.* at 565, 106 S. Ct. at 3098 ("[W]e specifically held in *Blum* that . . . the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." (quoting *Blum*, 465 U.S. at 898-900, 104 S. Ct. at 1548-50)). Judge Carnes' reliance on this passage is misplaced

for a number of reasons. As an initial matter, the statement is internally inconsistent: while providing that the named factors "cannot serve as independent bases for increasing the basic fee award," it also indicates that the factors are only "presumably" reflected in the lodestar amount. Thus, even standing alone, the statement provides uncertain support for Judge Carnes' opinion's conclusion.

More significantly, the statement is not a holding of the Court. It is merely part of a discussion summarizing *Blum* and citing the case with approval. A review of the discussion as a whole makes clear that the Court was not purporting to alter *Blum* in any way. Indeed, in the sentence immediately following the language at issue, the Court restated *Blum*'s holding that upward adjustments are proper "in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id.* (quoting *Blum*, 465 U.S. at 898-901, 104 S. Ct. at 1548-50). The Court's references to "specific evidence" are quoted from the portions of *Blum* addressing the showing necessary for an enhancement based on quality of representation.[1] Read in this context, the language cited by

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[1] *See Blum*, 465 U.S. at 899, 104 S. Ct. at 1549 (stating that quality of representation "may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional'" (quoting *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940)); *id.* at

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Judge Carnes' opinion cannot reasonably be characterized as a departure from *Blum*. Rather, it must be construed as a reaffirmation of *Blum*'s teachings concerning the "quality of representation" and "results obtained" factors: namely, that while these considerations are presumably reflected in the lodestar figure, and cannot serve as grounds for an enhancement where that is the case, the presumption may be rebutted by specific evidence.

The portions of *Delaware Valley I* setting forth the Court's holding confirm this interpretation. In concluding that the enhancement awarded by the district court was improper, the Court discussed the "quality of representation" factor in non-categorical terms consistent with *Blum*: "Because considerations concerning the quality of a prevailing party's counsel's representation *normally* are reflected in the reasonable hourly rate, the overall quality of performance *ordinarily* should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" *Delaware Valley I*, 478 U.S. at 566, 106 S. Ct. at 3099 (emphasis added). Moreover, the Court conducted a case-specific analysis, explaining how the record before it failed to support an upward adjustment. *See, e.g., id.* at 567, 106 S. Ct. at 3099 (noting that nearly one-third of hours reasonably spent on

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900, 104 S. Ct. at 1549 ("Absent specific evidence to the contrary, we cannot say that [the] rates . . . for these three attorneys do not fully reflect the quality of their representation.").

relevant phase of case were not compensated at hourly rate for most difficult work).

It was this lack of evidentiary support – rather than a blanket rule against consideration of the quality of representation or the results obtained – that compelled reversal, as the Court repeatedly made clear. As to the attorneys' performance, the Court stated: "[V]iewing the evidence submitted by Delaware Valley to support its petition for attorney's fees, there is no indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation. . . ." *Id.* The same conclusion applied to the results obtained: "Delaware Valley presented no specific evidence as to what made the results it obtained . . . so 'outstanding,' nor did it provide any indication that the lodestar figure for this portion of the case was far below awards made in similar cases where the court found equally superior quality of performance." *Id.* at 567-68, 106 S. Ct. at 3099. Finally, the Court deemed it significant that neither of the lower courts "made detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate." *Id.* at 568, 106 S. Ct. at 3099.

The Court left little doubt that these considerations were critical to its disposition of the case. Using language virtually identical to that of *Blum*, the Court concluded: "*In the absence of such evidence and such findings*, we find no reason to increase the fee

award . . . for the quality of representation." *Id.* at 568, 106 S. Ct. at 3099-100 (emphasis added). *Cf. Blum,* 465 U.S. at 900, 104 S. Ct. at 1549 ("Absent specific evidence to the contrary, we cannot say that [the] rates . . . for these three attorneys do not fully reflect the quality of their representation.").

These statements undermine any suggestion that *Delaware Valley I* precludes courts from ever considering the quality of representation and the results obtained as grounds for enhancing the lodestar figure. Such an interpretation cannot be squared with the Court's repeated descriptions of these factors as presumptively, but not absolutely, reflected in the lodestar figure. Moreover, had the Court intended to establish such a rule, its entire discussion concerning the deficiencies in the record and the lack of findings by the lower courts would have been unnecessary.

Judge Carnes' opinion argues that we may ignore the Court's statements regarding the record because they are merely alternative holdings. However, that view fails to account for the statement that immediately precedes the Court's record analysis: "Because considerations concerning the quality of a prevailing party's counsel's representation *normally* are reflected in the reasonable hourly rate, the overall quality of performance *ordinarily* should not be used to adjust the lodestar. . . ." 478 U.S. at 566, 106 S. Ct. at 3099 (emphasis added). At no point did the Court suggest that this unambiguous statement of the governing law (a statement that Judge Carnes' opinion does not address) was somehow an alternative

basis for its decision. Moreover, as discussed, the Court repeatedly made clear that the evidentiary deficiencies and lack of findings were essential to the outcome in the case. *See, e.g., id.* at 567, 106 S. Ct. at 3099 ("In sum, viewing the evidence submitted by Delaware Valley to support its petition for attorney's fees, there is no indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation provided during Phase V of the litigation."); *id.* at 568, 106 S. Ct. at 3099-100 ("In the absence of such evidence and such findings, we find no reason to increase the fee award . . . for the quality of representation."). There simply is no basis for concluding, as Judge Carnes' opinion does, that we are free to disregard virtually all of Part III.B of the Court's opinion.

Judge Carnes' opinion also relies on language in which the Court described enhancements for superior performance as "unnecessary" for purposes of enabling plaintiffs to secure legal assistance. *See id.* at 566, 106 S. Ct. at 3098. In the same discussion, however, the Court reiterated that such enhancements are not categorically barred, despite being disfavored as a general matter. In explaining the reasons for the "strong presumption" that the lodestar figure represents a reasonable fee, *see id.* at 565, 106 S. Ct. at 3098, the Court noted that an attorney who accepts a case "obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Id.* Therefore, the Court said, "[c]alculating

the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, . . . adequately compensates the attorney, *and leaves very little room for enhancing the award based on his post-engagement performance.*" *Id.* at 565-66, 106 S. Ct. at 3098 (emphasis added). The Court's subsequent description of performance-based enhancements as "unnecessary" must be read in light of that statement, which makes clear that such adjustments are permissible under narrow circumstances. Given that instruction, as well as the Court's numerous other statements articulating a non-categorical approach, the language cited by Judge Carnes' opinion cannot be read to preclude enhancements for performance in all cases.[2]

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[2] Judge Carnes' opinion also asserts that enhancements for superior performance cannot be reconciled with *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992), in which the Court held that enhancements for contingency are not permitted. As Judge Carnes' opinion notes, the *Dague* Court defined an attorney's contingent risk in a particular case as the product of "(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *Id.* at 562, 112 S. Ct. at 2641. However, *Dague* is inapposite because, unlike an attorney's level of risk, the quality of his or her representation cannot be defined solely by reference to these two factors. Two attorneys could bring identical claims, the merits of which are equally difficult to establish. Even if both attorneys prevail, it does not follow that their respective performances were necessarily equal in quality. In any given case, a host of factors beyond those relating specifically to the merits of a claim are pertinent to assessing the quality of an

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Accordingly, I cannot accept the conclusion that our decisions in *NAACP v. City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), were wrongly decided. In *NAACP*, the district court denied a request for an enhancement but failed to make findings with regard to one of the factors relied upon as a justification: "the assertion that the relief obtained was of great benefit to the black citizens of Evergreen and represented exceptional success." 812 F.2d at 1336. While stressing that the results obtained "normally will be subsumed in the calculation of a reasonable fee," *id.* at 1337, we noted that "[t]he award may be enhanced . . . 'in some cases of exceptional success,'" *id.*(quoting *Blum*, 465 U.S. at 897, 104 S. Ct. at 1548). We therefore remanded for reconsideration in light of those principles. *Id.* Similarly, in *Norman*, the district court failed to make a finding as to whether the results obtained were exceptional. 836 F.2d at 1306. In remanding, we were careful to note that even a finding of exceptional results would not support an enhancement unless the court also found that counsel's representation "was superior to that which would have been expected considering the rates requested." *Id.* (citing *Blum*, 465 U.S. at 899, 104 S. Ct. at 1549). *NAACP* and *Norman* thus are

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attorney's representation. Nothing in *Dague* precludes courts from considering these additional factors as possible grounds for an enhancement.

fully consistent with the principles set forth in *Hensley*, *Blum*, and *Delaware Valley I*.[3]

Other circuits share our understanding of the Court's teachings. *See, e.g., Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Cir. 2004) (concluding that *Delaware Valley I* permits enhancements based on quality of representation and results obtained in rare and exceptional cases); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (stating that upward adjustment for quality of representation "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and that the success was exceptional"); *Hyatt v. Apfel*, 195

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[3] Since *NAACP* and *Norman* were decided, we have repeatedly reiterated their understanding of the Court's teachings. *See Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F.3d 1357, 1359 (11th Cir. 2006) (per curiam) ("The court may then adjust the lodestar to reach a more appropriate attorney's fee, based on a variety of factors, including the degree of the plaintiff's success in the suit."); *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1308 (11th Cir. 2001) ("If the court determines that the result obtained was an excellent result, then the award of fees 'will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.'" (quoting *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940)); *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996) (per curiam order incorporating district court decision into opinion) ("After determining the lodestar, the court may adjust the amount depending upon a number of factors, including the quality of the results and representation of the litigation."); *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (per curiam) ("[The] 'lodestar' may then be adjusted for the results obtained.").

F.3d 188, 192 (4th Cir. 1999) (affirming enhancement for results obtained); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir. 1999) (stating that, to justify enhancement for outstanding service and results, applicant "must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended" (internal quotation marks omitted)); *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999) ("The lodestar may be adjusted based on several factors, including in particular the results obtained. . . ." (internal quotation marks and citation omitted)); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) ("The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional."); *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993) (noting that upward adjustments based on quality of representation and results obtained are proper where supported by specific evidence on record and detailed findings by lower courts). In each of these cases, the court recognized (at least implicitly) that *Delaware Valley I* did not fundamentally alter the controlling law regarding enhancements for outstanding performance and results. Judge Carnes' opinion thus conflicts not only with two decades of our own jurisprudence, but also with the decisions of numerous other courts.

II.

In this case, the district court made detailed findings as to why the lodestar figure did not fully reflect the quality of representation and the exceptional results achieved. As to the former, the court found that "the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation." *Kenny A. ex rel. Winn v. Perdue* (*Kenny A. III*), 454 F. Supp. 2d 1260, 1288 (N.D. Ga. 2006). In support of that conclusion, the court cited affidavits submitted by four attorneys with extensive experience in the Atlanta legal market, particularly in the area of class action litigation. *See id.* at 1290. These attorneys each stated that the hourly rates claimed by counsel would not provide a fee sufficient to reflect the value of the services performed. For example, Henry D. Fellows, Jr. testified:

> In the current Atlanta market for legal services, the Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would be generally inadequate and insufficient to induce lawyers of comparable skill, judgment, professional reputation and experience to perform the necessary services to prosecute a case of this magnitude on terms where the lawyers are not paid on an ongoing basis as the work is being performed, are required to advance case expenses of $1.7 million over a three

> year period with no ongoing reimbursement, and the lawyers' ability to recover a fee and expense reimbursement are completely contingent on the outcome of the case.

[Fellows Decl., R32:495:Ex.G:¶7; *see also* Knowles Decl., R32:495:Ex.D:¶11; Chandler Decl., R32:495:Ex.F:¶7; Rawls Decl., R32:495:Ex.H:¶7.]

In the view of three of these attorneys, a 1.5-2 multiplier was necessary to bring the fee award into line with awards in comparable class action litigations in the Atlanta market:

> Taking into account the work required to achieve the results obtained for the plaintiff class in this case, the level of expense and risk entailed for class counsel to prosecute this case over a three-year period with recovery of fee and investment in advanced case expenses, and fees actually awarded by courts in class actions in this district in securities, antitrust and other types of non-civil rights cases presenting comparable complexity and risk, a multiplier of no less than 1.5-2 times the lodestar amount . . . would yield a reasonable fee consistent with prevailing prices in the Atlanta legal market for legal services of comparable value.

[Fellows Decl., R32:495:Ex.G:¶8; *see also* Chandler Decl., R32:495:Ex.F:¶8; Rawls Decl., R32:495:Ex.H:¶8.]

Judge Carnes' opinion discounts these affidavits on the ground that the factors identified in them – the lack of ongoing payment, the advancement of case

expenses, and the contingent nature of the fee recovery and reimbursement – cannot support an enhancement. I agree with that conclusion insofar as it pertains to contingency. *See City of Burlington v. Dague,* 505 U.S. 557, 567, 112 S. Ct. 2638, 2643-44, 120 L. Ed. 2d 449 (1992) (holding that enhancement for contingency is not permitted under fee-shifting statutes). The other two factors, Judge Carnes believes, have already been accounted for because the lodestar was calculated using current rather than historic hourly rates. *See ante* at ___ (citing *Norman,* 836 F.2d at 1302). But we did not hold in *Norman* that the use of current rates will always be sufficient to compensate for delayed payment. Here, the affidavit testimony indicates that the rates used to calculate the lodestar, although current, would be inadequate to provide a reasonable fee in light of the exceptionally high commitment of capital resources by the attorneys and the three-year delay in receipt of payment. The district court properly relied on this evidence in concluding that an upward adjustment was warranted.

Judge Carnes' opinion also faults the district court for failing to give sufficient weight to the testifying attorneys' own interest in securing a high fee award for plaintiffs' counsel in this case. But determinations as to the credibility and the weight of testimonial evidence are clearly within the purview of the district court in these circumstances. *See Childrey v. Bennett,* 997 F.2d 830, 834 (11th Cir. 1993) ("[I]t is the exclusive province of the judge in non-jury trials

to assess the credibility of witnesses and to assign weight to their testimony."). Such determinations always involve an assessment of the factors bearing upon a witness's objectivity. It cannot reasonably be contended that the able and experienced district judge in this case never considered the possibility that the affiants – who are prominent Atlanta attorneys – might be known by plaintiffs' counsel, or that they could derive an indirect benefit from the precedential value of a high fee award. The court concluded, however, that these considerations were outweighed by other factors that bolstered the probative value of their testimony. These included the court's familiarity with the affiants, their reputations in the Atlanta legal community, and their experience in complex class action litigations. *See Kenny A. III*, 454 F. Supp. 2d at 1290. Absent any showing of clear error, it is improper for us to second-guess the court's determination, even if we would have made a different credibility finding or weighed the evidence differently. *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1561 n.5 (11th Cir. 1996) ("The credibility of competing experts and the weight to be accorded the evidence submitted by both sides will, of course, be decided by the district court, subject only to clearly erroneous review on appeal."); *Jones v. Childers*, 18 F.3d 899, 908 (11th Cir. 1994) ("We . . . will not presume to second guess the trial judge's assessment of the credibility of the witnesses and the weight assigned to their testimony."). Such deference is particularly appropriate in this case, given that the defendants did not introduce evidence challenging the

attorneys' conclusion that an enhancement was necessary to yield a fee consistent with prevailing rates in the Atlanta legal market for similar services.

In addition to the affidavits, the district court took into account its personal observations of the attorneys' performance in this case:

> [T]he court finds that the superb quality of [counsel's] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar. Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled legal representation, and the Court would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients.

Kenny A. III, 454 F. Supp. 2d at 1288-89; *see also id.* at 1286 ("[B]ased upon the Court's own substantial experience and familiarity with the prevailing rates in Atlanta, and the Court's observation of the stellar performance of plaintiffs' counsel throughout this long and difficult case, it finds the requested hourly rates eminently fair and reasonable. If anything, they are too low.").

In the area of fee awards, it is well established that "[t]he court . . . is itself an expert on the question

and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment . . . as to value." *Norman,* 836 F.2d at 1303 (quoting *Campbell v. Green,* 112 F.2d 143, 144 (5th Cir. 1940)). As part of this determination, the court may factor in its personal assessment of the quality of counsel's representation. *See Duckworth v. Whisenant,* 97 F.3d 1393, 1397 (11th Cir. 1996). The district court thus did not err in relying on these considerations as additional grounds for an enhancement.

As to the results obtained, the court found that the plaintiffs' success was "truly exceptional." *Kenny A. III,* 454 F. Supp. 2d at 1289. The court provided a detailed summary of the Consent Decree entered into by the parties, finding that it provided "sweeping relief to the plaintiff class" and was "comprehensive in its scope and detailed in its coverage." *Id.* Based on these considerations, the court found the result achieved to be "extraordinary," particularly in light of "the contentiousness of the litigation, complexity of the issues and the uncertainties and delays of further litigation." *Id.* at 1290 (internal quotation marks omitted). To underscore the truly exceptional nature of the outcome, the court again cited its own experience: "After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.*

Judge Carnes' opinion takes issue with the court's statement that the remedial measures established by the Consent Decree go beyond the relief the plaintiffs likely would have obtained had they prevailed at trial. We have recognized, however, that the unexpected nature of a result is relevant to the determination of whether it is exceptional. *See Norman*, 836 F.2d at 1302 ("[A]n outcome that is not unexpected in the context of extant substantive law will not ordinarily be exceptional."). In finding exceptional results here, the district court did not err in considering the fact that the remedies agreed upon by the parties exceeded its own expectations as to the nature and scope of relief likely to result from this litigation. *See id.* ("Exceptional results are results that are out of the ordinary, unusual or rare.").

Moreover, other courts have recognized that results similar to those obtained here can justify an enhancement. For example, in *Hyatt v. Apfel*, 195 F.3d 188 (4th Cir. 1999), the Fourth Circuit affirmed an enhancement for results obtained where the plaintiff class prevailed in challenging a Social Security Administration policy pertaining to disability benefits. The enhancement was proper, the court held, because the plaintiffs "succeeded in bringing about fundamental change to a recalcitrant agency," the challenged policy affected the determination of hundreds of thousands of disability claims, and the government promulgated new national regulations in response to the litigation. *Id.* at 191-92. The court also found it significant that "[t]hese results were

obtained in the face of monumental resistance [by the government] on every claim." *Id.* at 192. These factors closely resemble those involved in this case, where the plaintiffs succeeded in effecting systemic changes to the foster care systems in Fulton and DeKalb Counties, in spite of considerable opposition by defendants.

Likewise, in *Shipes v. Trinity Industries,* 987 F.2d 311 (5th Cir. 1993), the Fifth Circuit held that an enhancement might be warranted for the results obtained in a "lengthy and protracted" Title VII class action. *Id.* at 322. The court noted that the plaintiff's victory was complete on all issues and resulted in both substantial monetary damages and, "very importantly, future protection against discrimination in the form of injunctive relief." *Id.* The Consent Decree in this case provides similarly comprehensive relief. It remedies numerous existing deficiencies in the delivery of foster care services and provides safeguards against future unlawful conduct by defendants. These results are no less exceptional than those obtained in *Shipes.*

Additionally, we have recognized that the public benefit created by a lawsuit is an important factor in the determination of a reasonable fee award. In *Villano v. City of Boynton Beach,* 254 F.3d 1302 (11th Cir. 2001), we held that the district court erred in reducing a plaintiff's fee award without considering the public benefit of the case. *Id.* at 1307. We stated that "[p]ublic benefit is a distinct measure of success in civil rights actions," and thus it must be accounted

for in the calculation of a fee award. *Id.* We further recognized that the vindication of a constitutional right against a government institution heightens a lawsuit's public benefit by deterring future unconstitutional conduct by public officials. *Id.*; *see also Popham v. City of Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987) ("The affirmation of constitutional principles produces an undoubted public benefit that courts must consider in awarding attorneys' fees under Section 1988."). Accordingly, we instructed the district court as follows:

> On remand, the district court must examine the qualitative value of [plaintiff's] successes. In doing so, the court needs to account for the vital role private litigation plays in the enforcement of civil rights, the difficulties involved in sustaining those lawsuits, the heightened importance of such lawsuits when the defendant is a public body, and the public benefit that occurs when those lawsuits ultimately vindicate a constitutional right.

Villano, 254 F.3d at 1308 (citation omitted).

Although *Villano* involved the reduction of a fee award rather than an enhancement, its principles are relevant to this case. Through the provisions of the Consent Decree, the plaintiffs have obtained redress for the constitutional violations alleged in the complaint, thereby vindicating the constitutional rights of the class members. Given the scope of the remedial measures agreed to by the defendants, the public

benefit created by this litigation is enormous. *See Norman*, 836 F.2d at 1302 (stating that vindication of class-wide rights is generally more significant than relief for isolated constitutional violation). This consideration further supports the conclusion that an enhancement for exceptional success is warranted in this case.[4]

III.

I find no abuse of discretion in the district court's fee award. The court made detailed findings as to why the lodestar did not fully reflect the quality of representation and the results achieved in this case, and those findings are supported by specific evidence in the record. Because I conclude that the district

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[4] Judge Carnes' opinion argues that the public benefit created by a lawsuit cannot be a factor supporting an enhancement because every suit that vindicates a federal right benefits the public in some way. Therefore, he argues, taking the public benefit into account would result in an enhancement in every successful fee case. I disagree. The fact that every vindication of federal rights confers some public benefit does not mean that the benefit is equal in every case. The present case underscores this point. The district court's opinion demonstrates that the public benefit created here was truly exceptional, far exceeding that achieved in the majority of cases of this type. *See Kenny A. III*, 454 F. Supp. 2d at 1290 ("After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale."). Taking this factor into account is proper under the "results obtained" analysis, which asks whether the outcome in the case was "out of the ordinary, unusual or rare." *Norman*, 836 F.2d at 1302.

court's decision is consistent with controlling Supreme Court and Eleventh Circuit precedents, I concur only in the result.

Hill, J., concurring:

I concur in the judgment. The enhancement by the district court is due to be affirmed because we are bound by the prior cases of our court, *NAACP v. City of Evergreen,* 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery,* 836 F.2d 1292 (11th Cir. 1988).

I do not add anything to my colleagues' discussions of the holding and opinions in those cases other than to acknowledge that they are scholarly and well done.

No doubt these additional writings will be of interest to jurists who might wish to pursue the matter in further proceedings, should any arise.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A, by his next friend Linda Winn, et al.,

Plaintiffs,

v

SONNY PERDUE, et al.,

Defendants

CIVIL ACTION

1:02-cv-1686-MHS

ORDER

(Filed Oct. 3, 2006)

Before the Court are plaintiffs' application for an award of attorneys' fees and expenses of litigation, State Defendants' motion for review of taxation of costs by the Clerk of Court, and plaintiffs' motion for an interim award of attorneys' fees, costs, and expenses. The Court's rulings are set out below.[1]

Introduction

This class action brought on behalf of foster children in Fulton and DeKalb Counties has been one of the most complex and difficult cases that the undersigned has handled in more than 27 years on

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[1] The Court grants the parties' motions for leave to exceed page limitations.

the bench. Now that the matter has been successfully concluded through entry of a Consent Decree, one difficult issue remains: what is a reasonable amount of attorneys' fees and expenses to be awarded to plaintiffs' counsel? The parties do not dispute that plaintiffs' counsel are entitled to an award, but they differ widely on the appropriate amount of the award.

Plaintiffs, applying both lodestar and percentage-of-the-benefit approaches, seek a fee award of $14,342,868. This amount represents an enhancement of plaintiffs' claimed lodestar figure by a multiplier of two, as well as approximately 8.5% of the $168,688,220 common benefit that plaintiffs claim they generated for the plaintiff class. Plaintiffs also seek an award of $1,658,341.38 in expenses, almost half of which was expended on experts. Included in this figure are costs already taxed by the Clerk pursuant to a bill of costs in the total amount of $549,808.43, most of which ($467,323.32) was spent for exemplification and copies of documents.

State Defendants contend that all of these amounts are unreasonable and grossly excessive. Arguing that a percentage-of-the-benefit approach is not appropriate, State Defendants contend that a reasonable lodestar figure would be $2,971,754.52 and that no enhancement of the lodestar is warranted in this case. State Defendants also contend that none of plaintiffs' expert expenses are recoverable, and that an appropriate award for nontaxable expenses is $189,326.08. Finally, State Defendants object to a large portion of plaintiffs' claimed copying costs and

argue that the costs taxed by the Clerk should be reduced to $95,485.08.

Procedural History

As essential background to evaluating plaintiffs' request for fees and expenses, it is important first of all to appreciate the enormous time and effort involved in litigating this complex matter. Therefore, before turning to the specifics of plaintiffs' request, the Court will briefly review the procedural history of the case. As this history demonstrates, State Defendants vigorously fought plaintiffs' claims for almost three years, filing both motions to dismiss and for summary judgment, as well as seeking repeatedly to limit plaintiffs' discovery efforts. This strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur.

The complaint in this action was filed on June 6, 2002, in the Superior Court of Fulton County. There were nine named plaintiffs, all foster children in the custody of the Georgia Department of Human Resources, who sought to represent a class of all foster children in Fulton and DeKalb Counties and a subclass of African-American foster children. Plaintiffs were represented by attorneys from Children's Rights, Inc. (CRI), a New York-based advocacy organization for children, and the Atlanta-based Keenan's Kids Law Center. Shortly thereafter, the

Atlanta law firm of Bondurant, Mixon & Elmore (BME) joined the case as co-counsel for plaintiffs.[2]

The 75-page complaint asserted fifteen causes of action under both federal and state law based on alleged systemic deficiencies in foster care in both Fulton and DeKalb Counties. The alleged deficiencies included (1) assigning excessive numbers of cases to inadequately trained and poorly supervised case-workers; (2) not developing a sufficient number of foster homes properly screened to ensure the plaintiff children's safety; (3) not identifying adult relatives who could care for the plaintiff children as an alternative to strangers or impersonal institutions; (4) failing to provide relevant information and support services to foster parents in order to prevent foster placements from being disrupted; (5) failing to develop administrative controls such as an information management system that ensures plaintiff children are expeditiously placed in a foster home matched to meet the children's specific needs; (6) failing to provide timely and appropriate permanency planning, including failing to provide services that would enable plaintiffs to achieve their permanency planning goals; (7) placing plaintiffs in dangerous, unsanitary, inappropriate shelters and other placements; (8) failing to provide appropriate and necessary mental health, medical, and education services to children in

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[2] Later, at the request of CRI and BME, the Court removed Keenan's Kids Law Center as co-counsel for plaintiffs. *See* Order of September 5, 2003.

their custody; and (9) separating teenage mothers in foster care from their own children and separating siblings in foster care from each other without providing visitation. (Compl. ¶¶ 39-97.) Plaintiffs sought declaratory and injunctive relief to correct these alleged deficiencies.

The named defendants were the Governor of Georgia, the Georgia Department of Human Resources and its Commissioner, the Fulton County Department of Family and Children Services and its Director, and the DeKalb County Department of Family and Children Services and its Director (State Defendants). Plaintiffs also sued Fulton and DeKalb Counties for their alleged failure to provide foster children with adequate and effective legal representation. Those claims were resolved in separate settlements reached between plaintiffs and each county. Since the pending motions involve only fees and expenses related to plaintiffs' claims against State Defendants, this procedural history omits any reference to matters involving only the claims against Fulton and DeKalb Counties.

On June 19, 2002, defendants removed the case to this Court. On July 1, 2002, the Court granted plaintiffs' motion for expedited discovery regarding one aspect of the case: the safety and well-being of foster children housed in Fulton and DeKalb Counties' two emergency children's shelters. On September 19, 2002, plaintiffs filed an 80-page motion and brief seeking a preliminary injunction prohibiting defendants from continuing to operate the shelters in a

manner that allegedly violated plaintiffs' legal rights. State Defendants filed a 57-page response, and plaintiffs filed a 19-page reply. In November 2002, the Court held four days of hearings on the motion, during which the parties presented voluminous documentary evidence as well as both fact and expert witnesses. The parties then submitted more than 200 pages of proposed findings of fact and conclusions of law.

On December 12, 2002, the Court entered an Order finding that plaintiffs had established numerous major deficiencies in the foster care system in general and in the emergency shelters in particular. Nevertheless, in reliance on State Defendants' assurances that they planned to close the shelters and provide safe alternative emergency placements for children as well as address other deficiencies in the foster care system, and based largely on the Court's confidence in the integrity and competence of then-Commissioner of Human Resources Jim Martin, the Court denied the motion for a preliminary injunction without prejudice to its being renewed by plaintiffs if State Defendants failed to fulfill their promise. State Defendants subsequently reported to the Court that the Fulton and DeKalb shelters had both been closed, thus mooting plaintiffs' claims relating to the shelters.

Meanwhile, on November 4, 2002, State Defendants filed a 44-page motion to dismiss, which argued that the Court was required to abstain from hearing plaintiffs' claims under *Younger v. Harris*, 401 U.S. 37

(1971), because the proceedings would impermissibly interfere with ongoing juvenile court proceedings. State Defendants also argued that plaintiffs' claims were barred by the *Rooker-Feldman* doctrine. *See District of Columbia Ct. of Appeals v. Feldman,* 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16 (1923). Alternatively, State Defendants contended that most of plaintiffs' federal and state law claims failed to state a claim on which relief could be granted. State Defendants also filed a brief opposing class certification on the grounds that *Younger* abstention was required and that plaintiffs could not satisfy the commonality and typicality requirements.

While the Court took plaintiffs' motion for class certification and State Defendants' motion to dismiss under advisement, the parties proceeded with discovery, though not without resistance from State Defendants. At one point, the Court was forced to admonish State Defendants for "relying on technical legal objections to discovery requests in order to delay and hinder the discovery process." Order of January 7, 2003, at 4.

On July 7, 2003, the Court issued an Order extending fact discovery through October 31, 2003, and expert discovery through January 30, 2004. On August 18, 2003, the Court entered an Order denying State Defendants' motion to dismiss (except with regard to plaintiffs' shelter claims, which were dismissed as moot) and granting plaintiffs' motion for

class certification. *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003).

On February 20, 2004, following the close of discovery, State Defendants filed a motion for summary judgment. The motion was supported by a 74-page memorandum and a 126-page Statement of Undisputed Material Facts consisting of 612 separately number [sic] paragraphs, as well as a 48-page Statement of Legislative Facts consisting of 74 separately numbered paragraphs. In addition, State Defendants' motion was supported by six affidavits comprising more than 30 pages and by three volumes of appendices consisting of three expert reports and voluminous additional documents.

On April 5, 2004, plaintiffs filed a 96-page memorandum in opposition to State Defendants' motion for summary judgment together with a Statement of Disputed Material Facts that included a paragraph-by-paragraph response to State Defendants' Statement of Undisputed Material Facts. Plaintiffs' response was supported by four volumes of appendices comprising 178 exhibits. Plaintiffs also filed some 36 depositions together with voluminous deposition exhibits.

On May 7, 2004, State Defendants filed a 46-page reply brief. Then, on May 19, 2004, State Defendants filed a 38-page *Daubert* motion seeking to exclude the reports and testimony of all four of plaintiffs' experts. On June 7, 2004, plaintiffs filed a 25-page response together with copies of each of the experts' reports,

totaling over 400 pages. Depositions of each of the experts were also filed with the Court. On June 21, 2004, State Defendants filed a 16-page reply brief.

Meanwhile, on May 27, 2004, the Court held a case management conference and set a trial date of early January 2005. In an effort to encourage settlement discussions, the Court directed plaintiffs to make a settlement offer within 30 days. On July 30, 2004, the Court entered an Order establishing a schedule for the parties to update discovery previously obtained, for plaintiffs to conduct updated case record and investigative file reviews, and for production of supplemental expert reports and related discovery. The Court also directed the parties to report on the progress of settlement discussions. Finally, the Court pushed the trial date back to February 14, 2005, and directed the parties to file their proposed consolidated pretrial order by January 31, 2005.

On August 13, 2004, reports from the parties indicated that settlement discussions were at an impasse. Therefore, the Court decided to refer the case to mediation and directed the parties to attempt to agree upon a qualified mediator or else submit separate lists of proposed mediators. The parties were unable to agree on a mediator and each side objected to all of the mediators proposed by the other side. Consequently, the Court decided to appoint a mediator of its own choosing and on October 25, 2004, entered an Order appointing retired Georgia Court of

Appeals Judge Dorothy Toth Beasley to serve as mediator.

On December 13, 2004, the Court entered an Order denying State Defendants' motion for summary judgment and motion to exclude the reports and testimony of plaintiffs' experts. State Defendants promptly filed a motion to amend the Order to permit an immediate interlocutory appeal. While that motion was pending, efforts at mediation began in earnest. According to Judge Beasley, over the next four months the parties attended eighteen separate mediation sessions where they spent more than 110 hours trying to hammer out a settlement agreement.

On January 13, 2005, in order to facilitate mediation efforts and at the joint request of the parties, the Court entered an Order postponing the due date of the pretrial order until February 18, 2005, and postponing the trial date indefinitely. As mediation proceeded, the parties requested and the Court granted another extension of the due date of the pretrial order until March 25, 2005. No further extensions were formally granted but as the parties continued to make progress in their settlement efforts, the Court suspended the deadline for filing the pretrial order indefinitely so that they could concentrate on mediation.

Finally, the parties reached agreement on all issues (except attorneys' fees). On July 5, 2005, they filed a joint motion for preliminary approval of the settlement agreement. The Court granted the motion

and scheduled a fairness hearing for September 21, 2005. After considering the comments and objections of all interested parties, on October 27, 2005, the Court entered an Order approving the proposed Consent Decree.

As part of the Consent Decree, the parties agreed that plaintiffs were entitled to recover their expenses of litigation, including reasonable attorneys' fees and nontaxable expenses, pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 23(h). Consent Decree § 22. However, the parties were unable to reach agreement as to the appropriate amount of fees and expenses to be awarded.

On November 28, 2005, plaintiffs filed a bill of costs totaling $549,808.43, including $467,323.32 for "exemplification and copies of papers necessarily obtained for use in the case." On January 18, 2006, the Clerk formally taxed these costs.

On December 9, 2005, plaintiffs moved for an award of attorneys' fees in the amount of $14,342,860 and nontaxable costs in the amount of $1,679,115.46.[3] In support of their motion plaintiffs submitted the declarations of CRI lead attorney Marcia Robinson Lowry, CRI staff attorney Sara M. Bartosz, BME lead attorney Jeffrey O. Bramlett, and Atlanta attorneys Ralph Knowles, Ralph Goldberg, John A. Chandler,

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[3] Plaintiffs subsequently corrected this figure to $1,658,341.38. (Pls.' Reply Br. at 49.)

Henry A. Fellows, Jr., and James C. Rawls. Attached to Ms. Lowry's and Mr. Bramlett's declarations were nearly 2,500 pages of time and expense records. According to their summary of those records, plaintiffs' counsel expended 29,908.73 hours on this case. Based on claimed hourly rates for attorneys ranging from $215 to $495 and for paralegals and interns ranging from $75 to $150, this time results in a lodestar fee of $7,171,434.30. Plaintiffs seek an award of twice this amount, both as an enhancement of the lodestar and as a percentage of the common benefit plaintiffs claim they generated for the plaintiff class.

In their response, filed January 4, 2006, and a separate motion for review of taxation of costs filed on January 19, 2006, State Defendants contend that all of these amounts are excessive. They argue that a reasonable award in this case would be $2,971,754.52 in attorneys' fees plus $189,326.08 in nontaxable expenses and $95,485.08 in taxable costs.

On January 27, 2006, plaintiffs filed a motion for an interim award of attorneys' fees, costs, and expenses in the amounts acknowledged by State Defendants to be reasonable. Initially, plaintiffs sought an immediate interim award before the Court determined the appropriate amount of a final award. In their reply brief, however, plaintiffs clarified that they sought an interim award only in the event that State Defendants chose to appeal the Court's final award. State Defendants oppose any interim award.

Discussion

The Court will first address plaintiffs' argument that they are entitled to an award of fees under the common fund/common benefit approach. Next the Court considers the lodestar analysis. The Court then considers an appropriate award of expenses. Finally, the Court addresses plaintiffs' request for an interim award of fees and expenses.

I. The Common Fund/Common Benefit Approach

There are two principal exceptions to the general rule that each party to litigation must bear its own legal costs. First, there are fee-shifting statutes. Congress has enacted a number of statutes providing for the shifting of fees from one party to the other in certain circumstances. For example, 42 U.S.C. § 1988 is a fee-shifting statute which provides that a plaintiff who prevails in an action brought pursuant to certain civil rights laws, including 42 U.S.C. § 1983, is entitled to recover his or her reasonable attorneys' fees from the defendant. 42 U.S.C. § 1988(b). The parties in this case agree that plaintiffs are entitled to an award of attorneys' fees under this statute.

Second, there are the closely related common fund and common benefit doctrines. Under the common fund doctrine, attorneys in a class action in which a common fund is created are entitled to receive a reasonable percentage of the common fund as compensation for their services. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir.

1991). The common benefit doctrine extends the common fund doctrine to lawsuits that produce nonmonetary benefits. *Id.*

In this case, plaintiffs contend that under the common fund and common benefit doctrines they are entitled to a percentage of the value of the benefit conferred upon the plaintiff class by their efforts. By their calculation, the value of this benefit totals more than $168 million. (Bartosz Decl. ¶ 9.) This figure represents the sum of (1) enhancements to the budget of the Georgia Department of Family and Children Services occurring during the pendency of this action, and (2) fiscal obligations undertaken by the State Defendants to implement the Consent Decree. (*Id.* ¶¶ 6-8 & Ex. A.) For the following reasons, the Court concludes that neither the common fund doctrine nor the common benefit doctrine is applicable to this case.

First, the common fund doctrine is inapplicable because no fund was created by the parties' settlement. Instead, the settlement is one in which State Defendants have agreed to undertake certain actions to benefit foster children. Although it may be possible to place a dollar value on the benefit these actions will confer on the plaintiff class, this does not result in the creation of a common fund. The Sixth Circuit's analysis in a recent desegregation case is equally applicable to this case

> [T]he [common fund] doctrine is inappropriate here because there is simply no fund. The benefit provided to the plaintiff class –

> the desegregation of Tennessee's system of higher education – is not pecuniary in any conventional way and did not result in the creation of a fund to be divided up among the plaintiffs, as is the case in common fund cases. Although . . . the benefits attained could perhaps be *measured* as pecuniary – in the sense that a dollar value could be assigned to the cost of the remedial measures – transposing the action's social value into monetary value is imprecise, and more importantly, still leaves us without a fund. The money designated by Tennessee for the remedial programs goes to fund the programs, not to pay plaintiffs.

Geier v. Sundquist, 372 F.3d 784, 790 (6th Cir. 2004) (emphasis in original).

Second, an award of fees under the common fund doctrine would be contrary to the doctrine's rationale. The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Consistent with this perception, "a key element of the common fund case is that fees are not assessed against the unsuccessful litigant (fee shifting), but rather, are taken from the fund or damage recovery (fee spreading)." *Camden I*, 946 F.2d at 774. Here, however, plaintiffs acknowledge that "the fees requested must be paid by the state without cost or compromise to the benefit achieved for the Plaintiff Class." (Pls.' Br. at 28.)

Thus, counsel do not seek to spread their fees among the members of the plaintiff class by obtaining a percentage of a common fund generated for their benefit. Instead, they seek to shift their fees to State Defendants by way of a calculation based on a purely hypothetical common fund.

Third, this case does not fall within the special subset of cases to which the common benefit doctrine applies. Common benefit recovery is appropriate only where the defendant and the beneficiaries share an identity of interests. *See generally* Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 88-91 (Fed. Judicial Ctr. 2d ed. 2005). Such a recovery has generally been permitted in only two types of cases: suits by shareholders against their corporations and suits by union members against their union. *See Hall v. Cole,* 412 U.S. 1 (1973); *Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375 (1970). In such cases, "[f]ees are paid by the defendant, because it is the alter ego of the beneficiaries who would otherwise be unjustly enriched by the suit." Hirsch & Sheehey, *supra,* at 88. However, "[i]f the defendant and the beneficiaries have no such identity of interests, an award against the defendant is improper because it would shift the costs unfairly." *Id.* at 88-89. Here, there is no identity of interests between State Defendants and members of the plaintiff class; therefore, a common benefit recovery would not serve to spread the costs among all the beneficiaries but would merely shift the costs to State

Defendants, contrary to the purpose of the common benefit doctrine.

The fact that plaintiffs have asserted claims under Georgia law as well as 42 U.S.C. § 1983 does not change the foregoing analysis. As applied by the Georgia courts in the cases cited by plaintiffs, the common fund/common benefit doctrine is the same as that followed by the federal courts in the cases discussed above and is thus subject to the same restrictions. *See State of Georgia v. Private Truck Council of Am.*, 258 Ga. 531, 534-35 (1988); *Friedrich v. Fidelity Nat'l Bank*, 247 Ga. App. 704, 705-07 (2001).

Likewise, the Court's conclusion is not altered by the parties' acknowledgment that plaintiffs are entitled to recover their fees and expenses pursuant to Fed. R. Civ. P. 23(h), as well as 42 U.S.C. § 1988. Consent Decree § 22 A. Rule 23(h) provides in pertinent part that "[i]n an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties." Fed. R. Civ. P. 23(h). "This subdivision," however, "does not undertake to create new grounds for an award of attorney fees or nontaxable costs," but "applies only when such awards are authorized by law or by agreement of the parties." Fed. R. Civ. P. 23(h), Advisory Committee Notes to 2003 Amendments. For the reasons discussed above, a recovery under the common fund/common benefit doctrine is not authorized by law in this case. Nor did the parties agree to such a recovery. Therefore, Rule

23(h) does not provide a basis for the Court to apply the common fund/common benefit approach.

II. The Lodestar Analysis

Since the common fund/common benefit approach is not applicable to this case, the determination of an appropriate award of attorneys' fees is governed by 42 U.S.C. § 1988. The starting point for calculating reasonable attorneys' fees under 42 U.S.C. § 1988 is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" for the attorneys' services. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Blum v. Stenson*, 465 U.S. 886, 888 (1984). The product of these two numbers is commonly referred to as the "lodestar." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 563 (1986). After calculating the lodestar, the court may adjust the amount upwards or downwards based on a number of factors, such as the quality of the results obtained and the legal representation provided. *Blum*, 465 U.S. at 897; *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996). In accordance with this methodology, the Court will calculate the lodestar by first determining the number of hours reasonably expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated. The Court will then consider whether any adjustment to the lodestar is appropriate in this case.

A. Reasonable Hours

The Eleventh Circuit's decisions regarding attorneys' fees generally "contemplate a task-by-task examination of the hours billed." *ACLU of Georgia v. Barnes,* 168 F.3d 423, 429 (11th Cir. 1999). However, the Eleventh Circuit has also stated that "[w]here fee documentation is voluminous, . . . an hour-by-hour review is both impractical and a waste of judicial resources," and therefore is not required. *Loranger v. Stierheim,* 10 F.3d 776, 783 (11th Cir. 1994). In such cases, it is sufficient for the court to make "across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure," so long as it provides "a concise but clear explanation of its reasons for the reduction." *Id.*

This case clearly meets the requirements for a voluminous fee request. In *Loranger* itself, the motion, time sheets, and time summaries exceeded some 400 pages and sought recovery for approximately 3,000 hours billed by a single attorney. *Id.* at 779. In this case, the time records alone exceed two *thousand* pages and represent nearly 30,000 hours billed by 38 timekeepers. Clearly, the Court cannot "feasibly and expeditiously" engage in an hour-by-hour review of such a fee application. *Id.* at 783. Therefore, in accordance with *Loranger,* the Court will determine the total number of hours devoted to the litigation and then reduce that figure in gross with an across-the-board percentage reduction if such a reduction is warranted.

In determining a reasonable number of hours, the Court must exclude hours that were not "reasonably expended" due to, for example, overstaffing. *Hensley*, 461 U.S. at 434. "Work performed by multiple attorneys, however, is not subject to reduction where the attorneys were not unreasonably doing the same work." *Webster GreenThumb Co. v. Fulton County*, 112 F. Supp. 2d 1339, 1350 (N.D. Ga. 2000) (citations omitted). "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. If counsel fails to do so, the Court must do it for them. *Barnes*, 168 F.3d at 428.

The Court also must give due weight to the sworn declarations of co-lead counsel for plaintiffs, Marcia Robinson Lowry and Jeffrey O. Bramlett, who state that they have reviewed the entries in each compilation of time records submitted and have written off charges which, in the exercise of their billing judgment, they deemed excessive; and that the compilations and the summaries attached to their declarations are an accurate and reliable account of the work performed in this case. (Lowry Decl. ¶ 8; Bramlett Decl. ¶ 6.) Ms. Lowry and Mr. Bramlett each attest that all of the hours submitted were reasonable and necessary in order to furnish adequate representation to the plaintiff class. (Lowry Decl. ¶ 9; Bramlett Decl. ¶ 9.) Plaintiffs have also submitted the declarations of five experienced Atlanta attorneys, each of whom attests that, in light of

the nature and complexity of this case, the amount of time devoted to the case by class counsel was fair and reasonable and deserving of full compensation. (Knowles Decl. ¶ 7; Goldberg Decl. ¶ 8; Chandler Decl. ¶ 6; Fellows Decl. ¶ 6; Rawls Decl. ¶ 6.)[4]

Tasks for which fees are recoverable "include pre-litigation services in preparation of filing the lawsuit, background research and reading in complex cases, productive attorney discussions and strategy sessions, negotiations, routine activities such as making telephone calls and reading mail related to the case, monitoring and enforcing the favorable judgment, and even preparing and litigating the request for attorneys' fees." *Webster GreenThumb*, 112 F. Supp. 2d at 1350 (citations omitted). "Reasonable travel time of the prevailing party's attorneys ordinarily is compensated on an hourly basis, although the rate may be reduced if no legal work was performed during travel. As with attorneys' work, the hours expended by paralegals, law clerks, and other paraprofessionals are also compensable to the extent these individuals are engaged in work traditionally performed by an attorney." *Id.* (citations omitted).

The time records submitted in support of plaintiffs' fee application show that plaintiffs' attorneys,

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[4] Mr. Rawls notes a single exception for time charged by New York counsel for travel to and from and within Atlanta if, during that time, actual legal work was not taking place. (Rawls Decl. ¶ 6.)

paralegals, and legal interns devoted a total of 29,908.73 hours to this litigation. (Lowry Decl. Ex. 2; Bramlett Decl. Ex. 1.) State Defendants have presented a number of specific objections to the hours billed. They contend, first of all, that the billing records reflect a lack of billing judgment generally insofar as the time entries are "riddled with many vague and noncompensable narratives." (State Defs.' Br. at 27.) State Defendants also contend that the number of hours spent by plaintiffs' counsel on certain tasks was excessive. Specifically, State Defendants object to the number of hours spent on the following tasks: complaint and mandatory disclosures (1,648.41 hours), motion for preliminary injunction (1,770.33 hours), document production and analysis (7,195.86 hours), depositions and witness preparation (3,800.37 hours), discovery motions (777.13 hours), other investigation and background research (18.5 hours), intra- and inter-office conferences and correspondence(2,428 hours), expert witnesses and reports (1,819.76 hours), motion for summary judgment (1,720.99 hours), mediation and settlement (2,155.70 hours), pre-trial motions (1,151.06), trial preparation (2,124.55 hours), attorneys' fees application (86.70 hours), and miscellaneous matters (1,050.08).[5]

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[5] Plaintiffs' counsel failed to provide any task-by-task breakdown of their billing records, so State Defendants undertook to categorize the entries by task and state their objections by task. Plaintiffs have not stated any objection to State Defendants' categorizations, so the Court accepts them as accurate.

After carefully considering each of State Defendants' objections and conducting its own review of plaintiffs' counsel's time records, the Court agrees that some reduction in hours is appropriate because of vague and noncompensable time entries and because an excessive number of hours was spent on certain tasks. The Court will address each of State Defendants' objections in turn below and then determine what overall percentage reduction in hours is appropriate.

1. Billing Judgment

State Defendants seek at least a 5% reduction in the total lodestar to account for vague and noncompensable time entries in plaintiffs' counsel's billing records. Plaintiffs have not responded to this objection. The Court has reviewed the entries cited by State Defendants and agrees that many of the entries are too vague to permit the Court to determine whether the time was reasonably expended. Many of the entries also reflect purely administrative tasks that are noncompensable. Therefore, the Court will take these matters into account in determining an appropriate reduction in hours.

2. Complaint and Mandatory Disclosures

State Defendants contend that the 1,648.41 hours billed for pre-suit investigation and researching and drafting the complaint and mandatory disclosures is excessive. Relying on a decision in an earlier

case brought by CRI in Washington, D.C., State Defendants contend that no more than 450 hours is reasonable for this work. *See LaShawn A. v. Barry,* No. 89-1754, 1998 U.S. Dist. LEXIS 2137 at *18 (D.D.C. Feb. 17, 1998). State Defendants also argue that time spent researching a nuisance claim that was ultimately dismissed should not be allowed.

Plaintiffs respond that the hours spent were reasonable given the broad scope of the tasks included in this category, including factual investigation and legal research, evaluation of proper defendants, evaluation of the optimum scope for the case, evaluation of alternatives for achieving relief in state as well as federal courts, efforts to resolve the case prior to filing suit, as well as preparation of the initial complaint and mandatory disclosures. Plaintiffs point out that the pre-suit investigation in this case was an immense undertaking involving four state governmental hierarchies (DHR, State DFCS, Fulton DFCS, and DeKalb DFCS) and requiring extensive on-site witness interviews and follow-up factual investigations with foster children, foster parents, child advocates, members of the care provider community, adoption agency personnel, caseworkers, emergency shelter workers, law enforcement personnel, and various other stakeholders in Georgia's child welfare system, in addition to researching the parameters of plaintiffs' legal claims under seventeen causes of action covering state and federal law.

The Court recognizes that the preparation of this case for filing required a substantial amount of work,

much more than even the average class action. The Court rejects State Defendants suggestion that the Court should apply an arbitrary 450-hour cap based on another case from another jurisdiction which State Defendants have not shown is comparable to this case. The Court also rejects State Defendants' claim that work on the dismissed nuisance claim should not be compensated. The nuisance claim was dismissed as moot following the closure of Fulton and DeKalb Counties' emergency shelters. *See Kenny A. v. Perdue,* 218 F.R.D. 277, 297 (N.D. Ga. 2003). As discussed below in connection with plaintiffs' motion for preliminary injunction, such closure came in part due to plaintiffs' efforts to close the shelters, which included the assertion of the nuisance claim. Therefore, time spent researching this claim is compensable.

Nevertheless, while the Court cannot say precisely how much time this work should have taken, based on its experience in other complex class actions, 1,648.41 hours is excessive for pre-suit investigation and drafting the complaint and mandatory disclosures. The Court will take this into account in determining an appropriate percentage reduction in hours.

3. Motion for Preliminary Injunction

State Defendants contend that 1,770 hours to file pleadings, prepare for, and attend the preliminary injunction hearing is excessive. They note substantial billing entries by numerous timekeepers in the two

months prior to the hearing and object to the fact that seven attorneys and two paralegals billed for their attendance at the hearing. State Defendants also contend that all time in this category should be excluded because the Court denied the motion for preliminary injunction.

In response, plaintiffs point out that at the time this work was performed, the Fulton and DeKalb shelters were operating and overpopulated with children, and there was no reliable assurance that these dangerous conditions would abate without injunctive relief. Plaintiffs note that the work included numerous depositions, document productions, expert site inspections, and child interviews. They argue that even though the Court ultimately denied the injunction, State Defendants' commitment to close the shelters was due in large part to their efforts. Finally, plaintiffs contend they did not overstaff the preliminary injunction hearing and invite the Court to compare State Defendants' level of staffing.

The Court concludes that plaintiffs are entitled to compensation for the work on the motion for preliminary injunction, except for an appropriate reduction for the unnecessary number of attorneys who attended the hearing. The fact that the Court ultimately denied the motion does not require exclusion of this time. The Court found that plaintiffs had "made a compelling case" but opted to deny plaintiffs' motion (without prejudice, it should be noted) based on State Defendants' assurances that the shelters

would be closed. Order of December 12, 2002, at 3. The fact that the Court chose to rely on the State Defendants' assurances rather than issuing an injunction does not change the fact that, prior to plaintiffs' lawsuit, "few concrete steps were taken to close the shelters." *Id.* Plaintiffs' actions in filing this lawsuit and in seeking an injunction against the continued operation of the shelters were clearly major factors in the closure of these two dangerous shelters. Plaintiffs' efforts also resulted in the inclusion in the Consent Decree of significant protection against the risk of future peril from improper use of emergency shelters. *See* Consent Decree § 5 C.4.c. Accordingly, all the time reasonably spent on the preliminary injunction motion is compensable.

As far as overstaffing is concerned, the Court agrees with State Defendants that having seven attorneys and two paralegals at the preliminary injunction hearing and billing time for each of those individuals was unreasonable. (According to the Court's records, State Defendants had four attorneys and an unknown number of paralegals present at the hearing.) The Court will take this overstaffing at the hearing into account in reducing the total number of hours to be compensated.

4. Document Production and Analysis

State Defendants purport to be "dumbfounded" by the 7,195.86 hours that plaintiffs' counsel spent on document production and analysis, notwithstanding

their acknowledgment that "this was a document intensive case." (State Defs.' Br. at 38, 39.) They point to another recent case in this district, which was also a document intensive case and included evidence that the defendants had made the plaintiffs' task even more difficult, but where only 2,440 hours were required for document production and analysis. *See Webster GreenThumb,* 112 F. Supp. 2d at 1358. State Defendants also express astonishment that the time billed does not include an additional 13,500 hours expended by outside case readers for whose time and expense plaintiffs seek recovery in the nontaxable expense category. State Defendants argue that a 50% reduction in the number of hours would be appropriate.

In response, plaintiffs note that over the course of this litigation, nearly *half a million* pages of documents were produced, which counsel had to organize, review, copy, and scan into a document management system. Plaintiffs then had to retrieve from this document database and review those documents pertinent or potentially pertinent to each of more than 60 deposition witnesses and to the work of each of plaintiffs' experts. In addition, plaintiffs argue, even more comprehensive document retrieval and review were necessary to prepare various pre-trial filings, including the response to State Defendants' massive summary judgment motion and the pretrial order. As for the separate billings for case record review, plaintiffs argue that this was a completely separate task, which could have been done for half

the price had State Defendants cooperated with plaintiffs' cost-saving proposal to conduct a joint record review. As it was, plaintiffs were forced to undertake an exhaustive and time consuming process that had to be updated twice due to delays in discovery caused by State Defendants in which the original files of hundreds of children in DFCS custody were produced for review by a team of case readers under the direction of one of plaintiffs' experts, and a similar review of abuse investigation files was conducted by readers under the supervision of another of plaintiffs' experts. Finally, plaintiffs argue that State Defendants have failed to explain how or why the tasks in *Webster GreenThumb* were in any way comparable to those in this facially dissimilar case.

The Court concludes that the hours spent on document production and analysis are somewhat excessive, but that State Defendants greatly underestimate the number of hours reasonably expended on this task. The sheer volume of documents produced in this case was overwhelming. The Court can personally attest to this fact based on the massive number of documents submitted by the parties just in connection with State Defendants' motion for summary judgment, a number that was undoubtedly only a very small percentage of the total number of documents produced in this case. It would be hard to overestimate the amount of time reasonably devoted to organizing, reviewing, and managing such a huge number of documents. State Defendants' attempted comparison to the *Webster GreenThumb* case is

clearly inapposite. The two cases are simply not comparable. In *Webster GreenThumb*, no class was ever certified. Thus, in responding to summary judgment issues and preparing for trial, the plaintiff's counsel in *Webster GreenThumb* faced a far less burdensome task than plaintiffs' counsel here had to undertake in connection with documents produced regarding two distinct child welfare offices and child populations in Fulton and DeKalb Counties.

At the same time, based on its experience in other complex, document intensive cases, the Court finds that more than 7,100 hours expended on document review and analysis over the two-and-one-half years between the filing of the complaint and the commencement of mediation is unreasonable. That is the equivalent of more than one full-time employee reviewing and analyzing documents continuously for that entire time period. Accordingly, some reduction in the number of hours expended in this category is appropriate, and the Court will take this into account in arriving at an overall reduction percentage.

5. Depositions and Witness Preparation

State Defendants object on two grounds to the 3,800.37 hours that plaintiffs' counsel spent taking depositions and preparing witnesses. First, they contend that many of the depositions were overstaffed, citing seven instances where three plaintiffs' attorneys attended a deposition. Second, they argue that gross overbilling occurred in preparing for the

depositions. In support of this argument, State Defendants cite a single example where three plaintiffs' attorneys spent a combined 205.12 hours preparing for two purportedly similar depositions, those of Aisha Caul and Jane Cooper, the senior operational managers in the area of foster care for Fulton DFCS and DeKalb DFCS, respectively. State Defendants seek a 33% reduction of the hours in this category based on this alleged overstaffing and overbilling.

In response, plaintiffs point to the fact that State Defendants themselves chose to staff depositions with three and sometimes even four attorneys. They cite five examples, four where State Defendants had four attorneys in attendance at a deposition, and one where they had three. At all of these depositions, plaintiffs had only two counsel present. As for the single example of alleged overbilling, plaintiffs contend that the time spent preparing for the Caul and Cooper depositions was not unreasonable in light of the fact that these were among the most significant depositions taken in the case and that the Fulton and DeKalb DFCS offices had different organizational structures, different manifestations of systemic problems, different data and reporting systems, and sometimes different local policies in the field. Plaintiffs also note that each of the depositions spanned two days and produced transcripts running to 530 pages and over 400 pages, respectively.

The Court concludes that the number of hours expended in this category was reasonable. Plaintiffs prepared for and took or defended more than 60

depositions in this case, which works out to an average of approximately 63 hours per deposition. In light of the document review and other preparation needed for each deposition and the time spent in the depositions themselves, some of which spanned two days, this is not an unreasonable amount of time. State Defendants do not question the need for any of the depositions taken by plaintiffs. Their objection to plaintiffs' alleged overstaffing of depositions is not well-taken, since the record shows that State Defendants often had more attorneys in attendance at depositions than did plaintiffs. Finally, State Defendants' objection to alleged overbilling is also without merit, since the single example cited does not support their claim. Caul and Cooper were both critical witnesses whose depositions were difficult to prepare for because of their respective positions near the top of two related but dissimilar bureaucracies. Therefore, the Court cannot say that the time spent preparing for these depositions was unreasonable.

6. Discovery Motions

State Defendants contend that the 777.13 hours plaintiffs' counsel spent on discovery motions should be reduced by half for two reasons. First, they argue that an excessive number of attorneys attended the status conferences and other discovery-related conferences conducted by the Court. They cite two examples, one a discovery conference attended by three plaintiffs' attorneys and the other a status conference attended by five plaintiffs' attorneys. Second, State

Defendants contend that counsel spent an excessive amount of time drafting discovery motions and responses and preparing for conferences. Specifically, they cite 99.61 hours spent preparing for a discovery conference before Judge Goger in Fulton Superior Court before this case was removed, 60.03 hours spent responding to a motion to compel filed by State Defendants, and 217.87 hours spent in connection with a request for authorization to inspect the WestCare facilities and interview foster children there, including 121.08 hours spent filing the initial motion.

Plaintiffs respond that the hours spent on all these tasks were reasonable. According to plaintiffs, the conference before Judge Goger involved an emergency motion for expedited discovery related to dangerous conditions at the Fulton and DeKalb County shelters and required a substantial amount of time to conduct an independent investigation and compile a sufficient factual record to support the request. Similarly, plaintiffs contend that the time spent securing adequate discovery regarding the WestCare facilities was reasonable and necessary in light of State Defendants' resistance to allowing such discovery and the dangerous conditions at the facilities, which threatened the safety and well-being of children in the plaintiff class. Plaintiffs also argue that State Defendants should not be heard to complain about the time spent responding to their motion to compel, because the motion was baseless, was improperly filed without consulting with plaintiffs' counsel, and was filed in an effort to harass rather

than to further a legitimate discovery need. As for alleged overstaffing, plaintiffs contend that State Defendants have offered no evidence to rebut counsel's declarations that the time billed was reasonable and necessary.

The Court concludes that the time spent preparing for the Goger discovery conference and in connection with the WestCare motion was reasonable. As plaintiffs correctly point out, the discovery conference before Judge Goger related to a motion for expedited discovery regarding dangerous conditions at the Fulton and DeKalb shelters. After removal, plaintiffs renewed the motion and this Court granted it following a hearing. *See* Order of July 3, 2002. The original 100-page motion, memorandum, and attached exhibits filed by plaintiffs in the superior court amply attest to the fact that this request for expedited discovery required substantial factual investigation and research by plaintiffs' counsel. Given the terrible conditions at the shelters that were ultimately revealed as a result of plaintiffs' efforts, it can hardly be argued that this time was not fully justified. Likewise, given the evidence of dangerous conditions existing at the WestCare facilities, which replaced the DeKalb shelter, the time spent by plaintiffs' counsel to obtain access to those facilities was also fully justified, especially given that State Defendants unreasonably resisted such access notwithstanding the Court's prior admonition that "the rules of discovery were to be liberally construed to allow plaintiffs 'free and broad access to the shelters, their staff, and

residents.'" Order of December 3, 2004, at 4 (quoting Order of July 23, 2002, at 6).

The Court agrees with State Defendants, however, that time spent responding to their motion to compel was excessive. Plaintiffs' essential response to the motion was that it was moot because the documents sought had already been produced. It was clearly unnecessary to have spent in excess of 60 hours preparing this response. The Court also agrees with State Defendants that an unreasonable number of plaintiffs' attorneys attended many of the discovery and status conferences conducted by the Court. The Court believes it would have been reasonable for one attorney from CRI and one from BME to have attended such conferences, but often there were two or more attorneys from both CRI and BME present. Having this many attorneys present at Court conferences and billing time for each of them is unreasonable. Therefore, in arriving at an overall percentage reduction in hours, the Court will take into consideration both the overstaffing at these conferences and the excessive hours spent responding to State Defendants' motion to compel.

7. Other Investigation and Background Research

State Defendants challenge only the following two items in this category on the grounds that the time was spent on matters not necessarily related to this case: (1) 1.3 hours spent by a BME attorney

researching CRI, and (2) 17.2 hours spent by BME attorneys researching this Court's Fulton County Jail case, including talking with plaintiffs' counsel in that case. Plaintiffs contend that all of this time was reasonably necessary and useful to the prosecution of this case and therefore compensable. The Court agrees. First, it was clearly of benefit to the plaintiff class for BME to inform itself about its potential co-counsel in this case, and less than an hour-and-a-half of research in this regard was certainly reasonable. Second, 17.2 hours of research regarding the course and outcome of similar civil rights litigation in this Court was reasonable and appropriate to inform counsel's strategic planning in this case. *See New York State Assoc. For Retarded Children v. Carey,* 711 F.2d 1136, 1146 & n.5 (2d Cir. 1983) (allowing compensation for background research and reading in complex cases).

8. Intra- and Inter-Office Conferences and Correspondence

State Defendants seek a 50% reduction in the 2,428.04 hours spent by plaintiffs' counsel in conferences, meetings, and correspondence with other timekeepers. They note that this constitutes 8% of all time expended in the case and contend that this reflects a duplication of effort arising from the large number of plaintiffs' attorneys and paralegals who worked on the case, as well as the high rate of turnover among plaintiffs' counsel.

In response, plaintiffs argue that the hours spent on these tasks reflect the practical realities of large-scale litigation conducted by two different law offices, one in New York and one in Atlanta. They point out that the hours presented to the Court have already been reduced by plaintiffs' counsel by excluding time billed by more than three CRI attorneys for any particular meeting or conference. Finally, plaintiffs deny that attorney turnover had any significant impact on the hours billed in this category, noting that the vast majority of time was spent by attorneys who worked on the case throughout all or most of the course of the litigation.

The Court rejects State Defendants' suggestion that a 50% reduction of the time in this category would be appropriate. Plaintiffs correctly point out that in order to conduct class action litigation efficiently and effectively, there must be careful planning, coordinated team execution, and open communication and sharing of information among team members, all of which are best achieved through period conferences to set strategy and assign resources. Plaintiffs are also correct in their contention that the amount of turnover experienced within counsel's respective offices would not have significantly impacted the number of hours billed in this category. Nevertheless, the Court believes that the very large number of attorneys and paralegals who worked on this case inevitably resulted in some duplication of effort. This is reflected by the fact that more than 8% of all the time expended on the case

was devoted to communications among counsel. While some of this time was undoubtedly reasonable and necessary, the Court finds this percentage somewhat high even for a complex class action such as this. Accordingly, the Court believes that some reduction in these hours is appropriate and will consider this in arriving at an overall percentage reduction in hours.

9. Expert Witnesses and Reports

State Defendants argue that the 1,819.76 hours spent by plaintiffs' counsel preparing and consulting with experts and drafting and revising expert reports is excessive and unnecessary. They contend that the attorneys' time should be reduced by 60% because plaintiffs' counsel should not be compensated for helping to prepare or revise expert reports that were supposedly written by the experts themselves. In addition, State Defendants ask that the paralegals' time be reduced by 90% because the vast majority of the work they performed was administrative and secretarial in nature.

In response, plaintiffs contend that the substantial time devoted to the presentation of their four expert witnesses – three of whom prepared multiple reports to reflect developments within DHR and DFCS as the case proceeded through discovery – was entirely appropriate and reasonable given the sheer volume of systemic evidence to be considered. They argue that the experts took complete responsibility

for forming their opinions and identifying the issues to be reviewed, but that a significant amount of attorney and paralegal time was required to pull together and supply pertinent information from depositions, documents, or other evidentiary sources as the experts directed during the course of their reviews.

The Court concludes that the hours expended in this category are excessive, although not to the extent suggested by State Defendants. Undoubtedly, a large amount of attorney and paralegal time was reasonably and necessarily devoted to aiding plaintiffs' experts in their review of the voluminous depositions, documents, and other evidentiary materials produced in this case. Nevertheless, some time entries by attorneys reflect time spent drafting and revising expert reports, work which should have been done by the experts themselves. Likewise, many of the paralegals' time entries reflect that the work performed was administrative and secretarial in nature. Such nonlegal work by paralegals is not compensable. Accordingly, the Court will take this into account when it considers a reasonable percentage reduction in the total hours expended on this case.

10. Motion for Summary Judgment

State Defendants seek a 75% reduction in the 1,720.99 hours expended by plaintiffs' counsel in responding to their motion for summary judgment. They argue that this large amount of time expended

in just a little over a month preparing a single brief and response to a statement of undisputed material facts is grossly excessive.

Plaintiffs contend that the hours were justified because of the sheer size of State Defendants' motion, which included a 74-page memorandum and a 126-page statement of undisputed material facts consisting of 612 separately number [sic] paragraphs, as well as a 48-page statement of legislative facts consisting of 74 separately numbered paragraphs, six affidavits comprising more than 30 pages, and three volumes of appendices consisting of three expert reports and voluminous additional documents. Plaintiffs also contend that the motion never should have been filed at all because the vast evidentiary record compiled in this litigation raised myriad factual disputes in relation to a broad range of material issues.

Regardless of whether State Defendants acted in bad faith by filing a motion for summary judgment, the Court concludes that the time expended by plaintiffs' counsel in responding to the motion was clearly excessive. Even taking into consideration the voluminous nature of the motion and the time-consuming task of responding to each paragraph of State Defendants' statement of undisputed material facts, the number of hours expended was unreasonable. One need only consider the fact that 1,720 hours is the equivalent of one attorney working full time for nearly an entire year to conclude that no response to a motion for summary judgment justifies such an expenditure of time. The Court will take this into

consideration in arriving at an appropriate overall percentage reduction in plaintiffs' counsel's hours.

11. Mediation and Settlement

State Defendants object to the 2,155.70 hours plaintiffs' counsel spent working on mediation and settlement. Specifically, they contend that Mr. Lustbader's and Mr. Bramlett's time should be reduced because they billed substantially more hours than Ms. Lowry, who was plaintiffs' principal negotiator. State Defendants also contend that Ms. Hirokawa's hours should be reduced because her primary role was to type notes on a laptop during the meetings, a task that could have been performed by a paralegal billing at a much lower rate.

Plaintiffs contend that State Defendants' argument fails to take into account the substantial legal analysis, professional judgment, research, document review, preparation, drafting, and consultations among counsel, clients, and with Georgia child welfare stakeholders that were necessary both between mediation sessions and during break-out sessions outside the presence of State Defendants' counsel. Specifically, plaintiffs note that Mr. Lustbader spent substantial time and effort preparing, formulating, and drafting plaintiffs' mediation proposals, and that Ms. Hirokawa participated substantially in formulating, drafting, and revising plaintiffs' proposals and in consulting with co-counsel concerning these proposals during the course of the mediation.

The Court concludes that the time expended in this category is reasonable. The mediation effort in this case went far beyond anything that this Court has seen in any previous case. Not only were there nearly twenty mediation sessions conducted over a period of months, but this intensive negotiation effort clearly required, in addition to the mediation sessions themselves, substantially more time outside the sessions to research, discuss, formulate, and draft different settlement proposals. The final result of all this effort was a detailed, 47-page Consent Decree that provided extraordinary benefits to the plaintiff class and avoided the costs and risks of a lengthy trial. State Defendants offer nothing but their unsupported "belief" to challenge the number of hours spent by some of plaintiffs' attorneys in this effort. This is clearly insufficient to overcome the sworn testimony presented by plaintiffs that the time spent was reasonable and necessary.

12. Pretrial motions

Of the 2,124.55 hours expended in this category, State Defendants seek to exclude entirely 705.62 hours expended after December 1, 2004, on preparation of the pre-trial order. State Defendants argue that this time should be excluded because it came after the Court had ordered the parties to mediation, and it was clear that adequate time would be allowed for preparing the pre-trial order if no settlement were reached.

In response, plaintiffs point to their frequently voiced insistence on the earliest trial date possible in order to assure that plaintiff class members did not continue to be denied basic child welfare services for any longer than necessary. Plaintiffs also note their legitimate concern that the delay occasioned by an unsuccessful mediation would require a further case record review to update systemic performance data, resulting in even greater cost and even further delay. Accordingly, plaintiffs' counsel believed that timely preparation of the final pretrial order represented the prudent and, most likely, the least expensive litigation approach under the uncertain circumstances.

The Court concludes that counsel's time spent preparing the pretrial order is fully compensable. Even though the pretrial order was never filed because the parties ultimately reached a settlement, the issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). Here, faced with the uncertain prospect of successful mediation and the need to be ready for trial promptly if mediation should fail, plaintiffs' counsel reasonably exercised their professional judgment to suspend trial preparation only when it became evident that mediation might actually bear fruit. Therefore, the hours they reasonably spent preparing the pretrial order, even after mediation was under way, are fully compensable.

13. Trial Preparation

State Defendants seek a 90% reduction in the 2,124.55 hours expended by plaintiffs' counsel for trial preparation, almost all of which was spent drafting findings of fact and conclusions of law, arguing that this amount of time was grossly excessive and largely unnecessary. Plaintiffs respond that, without the benefit of hindsight, they were required to prepare this case as if it was going to trial until it became reasonably clear that the case would settle. Plaintiffs argue that the large amount of time spent preparing detailed and comprehensive findings of fact and conclusions of law was reasonable and necessary because the child welfare systems that were the target of this action evolved and changed while the suit was pending, thus requiring plaintiffs to continuously revise and update their draft findings and conclusions.

As noted above with respect to time spent on the pretrial order, the Court appreciates that plaintiffs could not suspend all trial preparation efforts once mediation was under way in the mere hope that a settlement would be reached. Consequently, some amount of time spent drafting proposed findings and conclusions is clearly reasonable. Nevertheless, the Court cannot agree that it was reasonable to spend more than 2,000 hours on this task. While the Court does not believe that the 90% reduction sought by State Defendants is reasonable, the Court finds that some reduction in this category is appropriate. Accordingly, the Court will take this into consideration

in determining the overall percentage reduction figure.

14. Attorneys' Fees Application

State Defendants seek to exclude all 86.70 hours expended by plaintiffs' counsel on their fee application. They argue that none of the time claimed in this category is compensable because the billing records and the fee submission itself show that counsel spent all time in this category on their baseless common fund argument and no time seeking to assist the Court in addressing the lodestar analysis. Plaintiffs respond that the law is well settled that time spent on a fee application is compensable, and they dispute State Defendants' characterization of their common fund argument.

The Court concludes that the time spent preparing the fee application is fully compensable. The courts are unanimous that time spent working on a fee petition and litigating a fee dispute is compensable. Hirsch & Sheehey, *supra,* at 28 & n.149. Although the Court found the common fund/common benefit doctrine to be inapplicable, plaintiffs' argument in this regard was not frivolous. Also, although plaintiffs' counsel did not organize their time records by task, they did prepare extensive declarations describing the work done in this case and they responded in detail to each of State Defendants' objections to the fee petition. They are entitled to be compensated for this time.

15. Miscellaneous

State Defendants challenge two items in this category. First, they object to 58.75 hours expended in connection with the removal of Keenan's Kids Law Center as co-counsel for plaintiffs, arguing that State Defendants should not be required to compensate plaintiffs' counsel for their "internecine squabbles." (State Defs.' Br. at 65-66.) Plaintiffs argue that these hours were reasonably expended for the benefit of the plaintiff class and in furtherance of the efficient conduct of this litigation and are therefore compensable. Plaintiffs also note that they have not sought compensation for any time spent on the case by Keenan's Kids Law Center before its removal, resulting in a net decrease in State Defendants' liability for fees and expenses. The Court concludes that this time is compensable because it was reasonably and necessarily expended for the benefit of the plaintiff class.

Second, State Defendants seek a 10% reduction of the 767.27 hours spent by plaintiffs' counsel on travel on the grounds that it is excessive. State Defendants also contend that all travel time should be compensated at only one-half the normal hourly rate. The Court concludes that no reduction in travel time is justified. State Defendants contend that travel by multiple persons for the same deposition or mediation session was excessive. However, the Court has rejected the contention that plaintiffs overstaffed depositions, and State Defendants made no claim that mediation sessions were overstaffed. The Court

finds that such travel was therefore reasonable. The Court, however, agrees with State Defendants that all travel time should be compensated at one-half the normal hourly rate. *See, e.g., Wilder v. Bernstein,* 975 F. Supp. 276, 284 (S.D.N.Y. 1997) (compensating CRI attorneys at 50% of determined hourly rate).

B. Hourly Rates

The next step in the lodestar calculation is the determination of "a reasonable hourly rate" for the attorneys' services. *Hensley,* 461 U.S. at 433. A reasonable hourly rate is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Barnes,* 168 F.3d at 436 (quoting *Norman v. Housing Auth. of City of Montgomery,* 836 F.2d 1292, 1299 (11th Cir. 1988)). The applicant attorney's customary billing rate for fee-paying clients ordinarily is the best evidence of his market rate, although that information is not necessarily conclusive. *Dillard v. City of Greensboro,* 213 F.3d 1347, 1354-55 (11th Cir. 2000). A fee applicant may also provide opinion evidence of reasonable rates, which is usually done by submitting affidavits of other attorneys in the relevant legal community. *Duckworth,* 97 F.3d at 1396-97. Finally, the Court may use its own personal experience and expertise to assess the lawyering skills exhibited in the case. *Id.* at 1397.

Plaintiffs' counsel have requested reimbursement at the following hourly rates for the attorneys who worked on this case:

CRI		BME	
Marcia Lowry	$495	Jeff Bramlett	$450
Ira Lustbader	$320	Corey Hirokawa	$240
Sara Bartosz	$360	Gordon Hamrick	$225
Rose Firestein	$380	Lynn Adam	$290
Sarah Hechtman	$305	Jennifer Jordan	$225
Douglas Gray	$280	Nicole Iannarone	$225
Jeff Powell	$255	Alison Prout	$215
Erik Pitchal	$245		
Stacy Antonucci	$220		
Margaret Ross	$215		

In addition, plaintiffs' counsel seek reimbursement for time spent by paralegals, legal interns, and legal assistants at rates ranging from $75 to $150 per hour. (Lowry Decl. Ex. 2; Bramlett Decl. Ex. 1.)

In support of these rates, plaintiffs have submitted the sworn declarations of co-lead counsel Marcia Robinson Lowry and Jeffrey O. Bramlett, who state that the rates are fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment, and performance. (Lowry Decl. ¶ 25; Bramlett Decl. ¶ 10.) Mr. Bramlett further states that the rates requested for BME attorneys and legal assistants reflect the rates his law firm currently charges and collects from

clients who hire the firm to perform services on a Standard Hourly Rate basis. (Bramlett Decl. ¶ 6.) In addition, plaintiffs have submitted the sworn declarations of several highly experienced and well-respected members of the Atlanta bar, each of whom states that the rates requested are "reasonable and solidly within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience." (Chandler Decl. ¶ 5; Fellows Decl. ¶ 5; Rawls Decl. ¶ 5.)

State Defendants offer no evidence to rebut the prima facie proof of prevailing market rates submitted in connection with plaintiffs' fee application. Nevertheless, State Defendants argue that the Court should reduce Ms. Lowry's rate from $495 to $450 per hour, and the respective hourly rates for Ms. Firestein ($380) and Ms. Bartosz ($360) to $320 per hour. With regard to Ms. Lowry, State Defendants question whether the requested rate is truly an Atlanta rate, as claimed, rather than a New York rate, citing a 2004 New Jersey case in which Ms. Lowry sought only $400 per hour. State Defendants argue that there is no reason to value her time at a higher rate than Mr. Bramlett's, especially in the absence of any evidence explaining why her Atlanta rate should be higher than almost all other attorneys in the market, and given the fact that Mr. Bramlett himself is compensated near the very high end of the market. As for Ms. Firestein and Ms. Bartosz, State

Defendants argue that there is no reason their rates should be any higher than Mr. Lustbader's, who is CRI's associate director and acted as plaintiffs' "field marshal" in this litigation. (State Defs.' Br. at 72.)

In response, plaintiffs point out that the $400 per hour New Jersey rate for Ms. Lowry was part of a negotiated settlement of a disputed fee claim. With regard to Ms. Firestein and Ms. Bartosz, plaintiffs note that they both have significantly more experience than Mr. Lustbader (32 years and 19 years, respectively, as opposed to 13 years). Plaintiffs argue that in the absence of any evidence rebutting the reasonableness of their requested rates and in light of the advanced responsibilities shouldered by Mr. Lustbader, State Defendants' argument would appear to support an upward adjustment in Mr. Lustbader's rate rather than a downward adjustment in Ms. Firestein's and Ms. Bartosz's rates.

The Court concludes that the requested hourly rates are fair and reasonable. First, plaintiffs have carried their burden of presenting prima facie proof that the requested rates are consistent with the prevailing market rates in Atlanta for comparable work. State Defendants have presented no contrary evidence. Under these circumstances, it would arguably be an abuse of discretion for the Court to reduce the hourly rates requested. *See Washington v. Philadelphia County Ct. of Common Pleas*, 89 F.3d 1031, 1036 (3rd Cir. 1996) (where plaintiff met his prima facie burden under the "community market rate" lodestar test, and opposing party produced no

contradictory evidence, the district court could not exercise its discretion to adjust the requested rate downward). In any event, based upon the Court's own substantial experience and familiarity with the prevailing rates in Atlanta, and the Court's observation of the stellar performance of plaintiffs' counsel throughout this long and difficult case, it finds the requested hourly rates eminently fair and reasonable. If anything, they are too low.

Second, the rate that Ms. Lowry agreed to as part of a negotiated settlement of a fee dispute in another case has no relevance to the reasonable rate in this case. Given Ms. Lowry's more than 35 years' experience and her reputation as one of the preeminent child welfare rights attorneys in the country, it is certainly fair and reasonable that her time in this case should be compensated near the high end of the Atlanta market.

Finally, as plaintiffs correctly observe, the differential between Ms. Firestein's and Ms. Bartosz's rates and Mr. Lustbader's rate, when viewed in light of Mr. Lustbader's substantial responsibilities in the case, suggests that Mr. Lustbader's rate may be too low, not that Ms. Firestein's and Ms. Bartosz's rates are too high.

C. Calculation of the Lodestar

Pursuant to the foregoing discussion of the reasonable number of hours expended on this case and reasonable hourly rates, the Court calculates

plaintiffs' lodestar fee to be $6,012,802.90. In arriving at this amount, the Court made an across-the-board 15% reduction in the number of non-travel related hours claimed by plaintiffs' counsel. This percentage was determined by considering (1) the vague and noncompensable entries in counsel's billing records, *supra* section II.A.1; (2) the excessive number of hours spent on pre-suit investigation and drafting the complaint and mandatory disclosures, *supra* section II.A.2; (3) overstaffing at the preliminary injunction hearing, *supra* section II.A.3; (4) the excessive number of hours spent on document production and analysis, *supra* section II.A.4; (5) the excessive number of hours spent responding to a motion to compel and overstaffing of discovery and status conferences, *supra* section II.A.6; (6) the excessive number of hours spent in intra- and inter-officer [sic] conferences and correspondence, *supra* section II.A.8; (7) noncompensable time spent on expert witnesses and reports, *supra* section II.A.9; (8) the excessive number of hours spent responding to the motion for summary judgment, *supra* section II.A.10; and (9) the excessive number of hours spent on trial preparation, *supra* section II.A.13.

In determining the appropriate percentage reduction in hours to apply, the Court also considered other cases where similar reductions have been made. *See, e.g., Hensley*, 461 U.S. at 438 n.13 (approving 30% reduction to account for attorney's inexperience and failure to keep contemporaneous time records); *Marisol A. v. Giuliani*, 111 F. Supp. 2d 381, 401

(S.D.N.Y. 2000) (reducing hours by 15% to account for time spent on certain noncompensable matters, excessive time spent on certain other matters, and overstaffing); *T.M. Park Ave. Assocs. v. Pataki,* 44 F. Supp. 2d 158, 169 (N.D.N.Y. 1999), *vacated on other grounds,* 214 F.3d 344 (2d Cir. 2000) (reducing hours by 10% to account for insufficiently detailed records and 10% to account for excessive hours); *Wilder,* 975 F. Supp. at 286 (reducing lodestar by 10% to account for vague time entries); *Walker v. Coughlin,* 909 F. Supp. 872, 881 (W.D.N.Y. 1995) (reducing hours by 15% to account for inadequate documentation and lower rate of compensation); *Ragin v. Harry Macklowe Real Estate Co.,* 870 F. Supp. 510, 520-21 (S.D.N.Y. 1994) (reducing fee request by 30% to account for vagueness, duplicative claims, and failure to provide contemporaneous time records); *Meriwether v. Coughlin,* 727 F. Supp. 823, 827 (S.D.N.Y. 1989) (reducing fee request by 15% to account for vague entries).

The Court first calculated non-travel related fees by deducting any travel related time from the timekeeper's total, multiplying the resulting number by 0.85, and then multiplying that number by the appropriate hourly rate. The Court then calculated travel related fees by multiplying travel related hours by one-half of the appropriate hourly rate for each timekeeper who claimed travel time. The sum of the resulting calculations equals the lodestar, as set out below:

CRI non-travel related fees

	Hourly Rate	Hours Claimed x 0.85	Total
M. Lowry	$495	766.01	$ 379,174.95
I. Lustbader	$320	3227.16	$1,032,691.20
S. Bartosz	$360	1393.63	$ 501,706.80
R. Firestein	$380	394.75	$ 150,005.00
S. Hechtman	$305	823.44	$ 251,149.20
D. Gray	$280	1462.54	$ 409,511.20
J. Powell	$255	2248.10	$ 573,265.50
E. Pitchal	$245	1295.05	$ 317,287.25
S. Antonucci	$220	1206.19	$ 265,361.80
M. Ross	$215	241.61	$ 51,946.15
Legal Interns	$150	616.39	$ 92,458.50
Paralegals	$ 90	5260.96	$ 473,486.40
Total			$4,498,043.95

BME non-travel related fees

	Hourly Rate	Hours Claimed x 0.85	Total
J. Bramlett	$450	1472.20	$ 662,490.00
C. Hirokawa	$240	930.16	$ 223,238.40
G. Hamrick	$225	621.01	$ 139,727.25
L. Adam	$290	175.70	$ 50,953.00
J. Jordan	$225	33.49	$ 7,535.25
N. Iannarone	$225	15.56	$ 3,501.00
A. Prout	$215	15.56	$ 3,345.40
T. Reed	$150	1057.23	$ 158,584.50
J. Hogan	$115	469.80	$ 54,027.00

J. Taylor	$ 80	548.0	$ 43,840.00
T. Longshore	$ 95	258.15	$ 24,524.25
L. Amato	$ 80	128.27	$ 10,261.60
S. Fuselier	$135	73.78	$ 9,960.30
J. Clark	$150	22.36	$ 3,354.00
E. Young	$ 75	12.75	$ 956.25
Total			$1,396,298.20

Travel related fees

	Hourly Rate	Hours Expended	Total
M. Lowry	$247.50	148.58	$ 36,773.55
I. Lustbader	$160	176.0	$ 28,160.00
R. Firestein	$190	28.0	$ 5,320.00
S. Hechtman	$152.50	23.50	$ 3,583.75
D. Gray	$140	29.82	$ 4,174.80
J. Powell	$127.50	150.14	$ 19,142.85
E. Pitchal	$122.50	79.64	$ 9,755.90
S. Antonucci	$110	86.59	$ 9,524.90
J. Einbond	$ 45	45.0	$ 2,025.00
Total			$ 118,460.75
Grand Total			$6,012,802.90

The Court notes that this lodestar figure is commensurate with the attorneys' fees expended by State Defendants in this case. Evidence submitted by plaintiffs shows that through June 30, 2005, the State paid its two outside counsel in this case, Mark Cohen of Troutman Sanders and Jeff Davis of Davis & Davis, a total of approximately $2.4 million. (Pls.' Reply Br. Ex. 4.) This figure does not take into

account the fact that outside counsel working for the State are paid at significantly lower hourly rates than they would charge private clients.[6] Nor does it include 5,237.12 hours that attorneys within the State Law Department spent on this case. (*Id.*) Adjusting outside counsel's fees upward to account for their reduced hourly rates, and applying a modest $250 blended hourly rate to the hours spent on this case by Law Department professionals, indicates that State Defendants would have incurred legal fees in excess of $6 million if they had been required to pay for their legal services in this case at standard hourly rates in the private marketplace.[7]

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[6] The evidence submitted by plaintiffs shows that in 2002 the State paid Mr. Cohen $175 per hour for work on a suit challenging the State's redistricting plans, and that he was hired earlier this year, at a rate of $225 per hour, to defend the State's new law requiring voters to present a photo ID at polls. (Pls.' Reply Br. Ex. 5.) Based on the Court's own knowledge of prevailing market rates for legal services in Atlanta, these rates are approximately one-half of what an attorney of Mr. Cohen's experience and ability would generally charge a private client. Thus, the Court notes that State Defendants did not object to a $450 standard hourly rate for Mr. Bramlett, an attorney of comparable experience to Mr. Cohen.

[7] Doubling outside counsel's fees to approximately $4.8 million to account for their reduced hourly rates, *see* note 6 *supra*, and adding $1.3 million as the approximate value of professionals' time in the State Law Department (5,237.12 hours x $250 per hour) produces an overall adjusted fee of $6.1 million.

D. Adjustment to the Lodestar

The calculation of the lodestar does not end the Court's inquiry. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley,* 461 U.S. at 434 (footnote omitted); *see also Blum,* 465 U.S. at 897 ("there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high"). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . , and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley,* 461 U.S. at 435.

The Court recognizes that most of the factors relevant to calculating a reasonable fee award are already reflected in the lodestar amount and "thus cannot serve as independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986). Nevertheless, upward adjustments of the lodestar figure are still permissible "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Blum,* 465 U.S. at 899 (quoting *Hensley,* 461 U.S. at 435); *see also Norman,* 836 F.2d at 1302. The Court finds that plaintiffs have submitted such specific evidence in this case.

First, the evidence establishes that the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation. Specifically, the evidence shows that the hourly rates used in the lodestar calculation do not take into account (1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.[8] (Chandler Decl. ¶¶ 5-8; Fellows Decl. ¶¶ 5-8; Knowles Decl. ¶¶ 7-12; Rawls Decl. ¶¶ 5-8; Lowry Decl. ¶ 25; Bramlett Decl. ¶¶ 7(a)&(g), 10, 13-14.)

In addition, based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar. Quite simply, plaintiffs'

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[8] A lodestar enhancement cannot be based on contingency alone. *City of Burlington v. Dague*, 505 U.S. 557 (1992). In this case, however, the risk of nonrecovery is only one of several factors which, taken together, establish a level of service well beyond what could reasonably be expected for the rates claimed.

counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled legal representation, and the Court would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients.

Finally, the evidence establishes that plaintiffs' success in this case was truly exceptional. (Knowles Decl. ¶ 8; Goldberg Decl. ¶ 5; Lowry Decl. ¶ 22-24.) The Consent Decree provides sweeping relief to the plaintiff class, the scope of which can only be fully appreciated by summarizing its provisions. Its centerpiece is a series of thirty-one outcome measures that State Defendants have agreed to meet and sustain for at least three consecutive six-month reporting periods.

The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect; regular visits of foster children by case workers; approval and licensure of foster homes and other placements; the percentage of children who are the victims of substantiated maltreatment while in foster care; the percentage of children in foster homes that exceed their licensed capacity; the percentage of children who have experienced multiple moves while in foster

care; and periodic judicial reviews of the safety and status of foster children.

In addition, the Consent Decree requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children.

Moreover, State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a "needs assessment" to be conducted by a neutral expert. The settlement also includes processes for the supervision of private contract agencies that provide homes and services for foster children; improvements in foster parent screening, licensing and training, as well as foster parent support and communication; improvements in case manager training; improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in foster care; and improvements in efforts to maximize available federal funding.

Finally, the settlement provides that two child welfare specialists will serve as the Court's independent accountability agents charged with the responsibility of measuring and reporting publicly on the State Defendants' compliance with these and other undertakings as specified in the Consent Decree.

As the foregoing summary amply demonstrates, the settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage. Indeed, the Court has previously recognized that even if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as "intricately detailed and comprehensive" as that contained in the Consent Decree. Order for Final Approval of Consent Decree at 14 (Oct. 27, 2005). In the same Order, the Court observed that, "[c]onsidering the scope and detail of the comprehensive settlement reached by the parties in this case, particularly in light of the contentiousness of the litigation, complexity of the issues and the uncertainties and delays of further litigation, the Court finds the result achieved by the parties to be extraordinary." *Id.* The Court's assessment of the result achieved by plaintiffs' counsel in this case has not changed. After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.

Based on the foregoing considerations, the Court concludes that the lodestar should be adjusted upward by a multiplier of 1.75, resulting in a total fee

award of $10,522,405.08. In determining the appropriate multiplier, the Court has relied on the foregoing evidence supporting an enhancement of the lodestar, the Court's own experience and expertise in this area, and on the declarations of four disinterested Atlanta attorneys submitted by plaintiffs. Each of these attorneys – Ralph Knowles, John Chandler, Hank Fellows, and Jim Rawls – is well known to the Court and well respected in the Atlanta legal community, and each has extensive experience in complex class action litigation. Based on their review of this case, three of these attorneys state that "a multiplier of no less than 1.5-2 times the lodestar" would be necessary to "yield a reasonable fee consistent with prevailing prices in the Atlanta legal market for legal services of comparable value." (Chandler Decl. ¶ 8; Fellows Decl. ¶ 8; Rawls Decl. ¶ 8.) The fourth states that successful class counsel in similar cases have received multiples of 1.5-5 times the lodestar and recommends a multiplier of 5 in this case. (Knowles Decl. ¶ 12.) Considering all the evidence presented, the Court believes that it has selected the minimum enhancement of the lodestar necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case.

III. Expenses

Plaintiffs seek to recover $1,658,341.38 in total expenses, including $549,808.43 already taxed by the Clerk pursuant to a bill of costs. In addition, plaintiffs

seek prejudgment interest on each item of expense, and they also ask the Court to require State Defendants to bear all the costs of mediation. State Defendants challenge portions of both the nontaxable expenses and the taxable costs. They also contend that plaintiffs are not entitled to prejudgment interest, and they object to being required to pay all mediation costs. The Court will address each of these matters in turn and then calculate an appropriate expense award.[9]

A. Nontaxable Expenses

"[W]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under § 1988. As is true in other applications of section 1988, the standard of reasonableness is to be given a liberal interpretation." *Barnes*, 168 F.3d at 438 (quoting *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983)). As discussed below, State Defendants object to plaintiffs' recovery of all or a portion of the claimed expenses in the following categories.

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[9] Plaintiffs acknowledge that in order to avoid a double recovery, the costs ultimately taxed pursuant to the bill of costs should be deducted from the total expense award. (Pls.' Reply Br. at 50 n.39.)

1. Expert and Case Record Reviewer Fees and Expenses

State Defendants contend that plaintiffs are precluded from recovering $801,864.40[10] in claimed expert fees and expenses because 42 U.S.C. § 1988 does not explicitly allow recovery of expert fees in § 1983 cases. Plaintiffs argue that they are entitled to recover these fees and expenses for two reasons. First, they contend that such fees and expenses are recoverable in "hybrid" cases like this one, which involve claims under both § 1983 and other laws. Second, plaintiffs argue that the Court may award these costs because State Defendants' own conduct in litigiously refusing to participate in a joint case record review unreasonably and unnecessarily compounded these expenses. For the following reasons, the Court concludes that these expenses are not recoverable.

The Supreme Court has held that expert witness fees cannot be awarded to prevailing parties in cases brought under 42 U.S.C. § 1983 because 42 U.S.C. § 1988, which governs fee awards in such cases, does not explicitly allow recovery of expert fees in § 1983 actions. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 102 (1991). Plaintiffs argue that *Casey* does not preclude recovery here because they asserted

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[10] Plaintiffs' initial brief states that they expended $820,854.47 on experts (Pls.' Br. at 35), but State Defendants seek a reduction of only $801,864.40 based on their own calculation of the actual expense records. (State Defs.' Br. at 87 n.28.)

claims under other laws in addition to § 1983. However, the *Webster GreenThumb* decision on which plaintiffs rely does not support this argument. In *Webster GreenThumb,* Judge Thrash found that expert expenses were recoverable only because that case involved a claim under 42 U.S.C. § 1981, and Congress had amended § 1988 following *Casey* to explicitly authorize expert fee recovery in § 1981 cases. *Webster GreenThumb,* 112 F. Supp. 2d at 1380-81. Thus, *Webster GreenThumb* does not stand for the proposition that expert fees are recoverable in § 1983 cases that also assert claims under *any* other laws.

In this case, plaintiffs asserted fifteen causes of action under both federal and state law. The federal law claims were brought pursuant to 42 U.S.C. § 1983 for alleged violations of certain of plaintiffs' federal constitutional and statutory rights, while the state law claims were based on alleged violations of certain rights secured under the Georgia Constitution and several Georgia statutes. *See Kenny A.,* 218 F.R.D. at 283. Plaintiffs have cited no authority to support their contention that the mere existence of these state law claims somehow gives rise to a right to recover expert fees and expenses when no such right is provided in § 1988 with respect to the § 1983 claims.

Plaintiffs also contend that these fees and expenses are recoverable under 28 U.S.C. § 1927 due to State Defendants' refusal to participate in a joint case record review. Section 1927 authorizes the Court to require "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously

. . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Plaintiffs, however, have submitted no evidence to support their claim that counsel for State Defendants acted "unreasonably and vexatiously" in refusing to agree to a joint case record review. Even if this were shown, it would not entitle plaintiffs to recover *all* of their expert fees and expenses, but only the *excess* costs that were incurred due to State Defendants' unreasonable and vexatious conduct. Plaintiffs have submitted no evidence of what this amount might be. Thus, there is no evidence in the record on the basis of which the Court could make an award of expert fees under 28 U.S.C. § 1927.

2. Meals and Meeting Expenses

State Defendants object to BME's claim of a total of $1,324.08 for "business meals" and CRI's claims of $16,647.52 for "travel/meals" and $2,706.63 listed as "meeting expenses" (which, upon review, are charges for lunches and dinners for attorneys in the case) on the grounds that the cost of meals is a common overhead expense that is not recoverable under 42 U.S.C. § 1988. Plaintiffs contend that meals are a type of expense for which the Court may allow reimbursement because they would be charged to a paying client in the relevant market, relying on the unrebutted attorney declarations stating that plaintiffs' overall expenses were reasonable.

The Court agrees with State Defendants that the cost of meals is a common overhead expense and therefore not recoverable. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1299 n.13 (11th Cir. 1999) (noting district court's elimination of costs of meals for class counsel); *Brother v. Miami Hotel Inv., Ltd.*, 341 F. Supp. 2d 1230, 1240 (S.D. Fla. 2004) (costs of meals disallowed since they should be absorbed as general overhead); *Rau v. Apple-Rio Mgmt. Co.*, 1:97-cv-2345-GGB, 2000 U.S. Dist. LEXIS 20375 at *22 (N.D. Ga. Mar. 29, 2000) (excluding costs of meals during trial "as meals are normal expenses of everyday life"); *Eastland v. Tenn. Valley Auth.*, No. 73-G-0487-NW, 1987 U.S. Dist. LEXIS 9085 at *20 (N.D. Ala. Sept. 30, 1987) ("Meals are unrecoverable as common overhead expense.").

3. Federal Express Charges

State Defendants seek a 90% reduction in the $56,859.45 sought by plaintiffs for Federal Express delivery charges. State Defendants argue that they should not be assessed this unusually large Federal Express expense because plaintiffs' counsel elected to forgo using regular mail delivery service and instead chose the luxury and convenience of an overnight delivery service.

In response, plaintiffs have submitted the declaration of Tanya C. Reed, a paralegal who was the primary case manager for this litigation at BME. Ms. Reed states that the bulk of the Federal Express

expenses were necessitated by State Defendants' frequent eleventh-hour document productions shortly before critical depositions or series of depositions. (Reed Decl. ¶ 8.) Because of these last-minute productions, plaintiffs' counsel were required to make substantial use of Federal Express deliveries in order to send copies of documents between Atlanta and New York counsel, so that counsel could adequately prepare for the pending depositions. *Id.*

Based on Ms. Reed's declaration, as well as the attorney declarations submitted by plaintiffs, the Court concludes that the Federal Express expenses were reasonably and necessarily incurred and are therefore recoverable.

4. CRI Phone Charges

State Defendants seek a 50% reduction in the claim by CRI for $15,053.77 in telephone charges. State Defendants contend that these charges are unreasonable in light of many of the descriptions of the charges and the fact that they are nearly five times higher than the long distance charges submitted by BME. They specifically challenge two entries that appear to be personal and unrelated to this case and question over $800 in charges incurred before the complaint was filed.

Plaintiffs contend that the amount is entirely reasonable considering over four years of fact and witness development and the obvious need for regular communications among plaintiffs' counsel and between

plaintiffs' counsel and State Defendants' counsel. Plaintiffs note that it is hardly surprising that CRI's phone charges are significantly higher than BME's since this action was filed and litigated in Atlanta. Plaintiffs also contend that $800 of phone charges over six months of pre-filing investigation is entirely reasonable. Finally, plaintiffs agree to withdraw the two apparently personal entries, totaling $354.60.

For the reasons given by plaintiffs, the Court concludes that the amount claimed for telephone charges is reasonable and therefore recoverable, with the exception of the $354.60 in charges that plaintiffs have withdrawn.

5. Travel and Hotel Expenses

State Defendants seek a 25% across-the-board reduction in the $162,181.17 requested by plaintiffs for airfare and hotels. They raise four objections. First, State Defendants argue that the amount is excessive insofar as much of the travel resulted from plaintiffs' overstaffing various hearings, depositions, and conferences. Second, State Defendants contend that travel of out-of-town counsel could have been reduced because local counsel could have ably handled many matters in the case. Third, State Defendants object to reimbursement of a "travel agent fee" for airline flights booked by CRI. Finally, State Defendants argue that expenses for seven trips to New York by Mr. Bramlett are excessive.

The Court concludes that these charges are entirely reasonable given that this case was litigated over a period of more than three years and included over 60 depositions and six months of face-to-face settlement negotiations. The Court has found that the claim of overstaffing is unfounded except for the preliminary injunction hearing, and it is the Court's recollection that New York counsel did the lion's share of the work at that hearing so their travel was not unnecessary. While local counsel in this case was certainly quite able, it was not unreasonable for CRI and especially Ms. Lowry to serve as co-lead counsel given the extent of their experience and expertise in the area of child welfare litigation. The objection to the travel agent charge is unfounded, since this is an ordinary expense of travel and presumably resulted in a net cost savings by obtaining the most direct flight and the least expensive fare available. Finally, the Court finds that Mr. Bramlett's expenditure of $7,151.76 in travel expenses to meet with New York co-counsel and expert witnesses over the course of this four-year litigation is reasonable, especially considering that the alternative was for New York legal team members to travel to Atlanta, likely resulting in the equivalent or even greater expense.

6. Public Transportation

State Defendants seek a 50% reduction in CRI's claim for $36,384.49 for "public transportation." State Defendants argue that a review of the entries in this category reveals that many are for the cost of CRI

attorneys and paralegals to take taxis home from the office. State Defendants contend that plaintiffs are entitled to reimbursement for reasonable out-of-town travel but not for the convenience CRI offers its staff in taking taxis home from its office.

Based on the unrebutted attorney declarations submitted by plaintiffs, which establish that these charges are fair and reasonable in light of the declarants' experience with the types of expenses typically charged to paying clients in the Atlanta market, the Court concludes that these expenses are recoverable.

B. Taxable Costs

In their motion for review of taxation of costs, State Defendants object to all of the $467,323.32 claimed by plaintiffs' counsel for photocopying costs, except for $12,999.97 listed as paid to third-party contractors as reimbursement for copies made of those contractors' files. Relying on a line of cases dealing with the extent to which copying costs can be recovered as taxable costs under 28 U.S.C. § 1920, State Defendants argue that these costs should not be allowed because plaintiffs failed to submit any documentation to establish that the copies made were necessary for use in this case rather than merely for counsel's own convenience.

In response, plaintiffs note that State Defendants themselves admit that this was an extremely document intensive case. Therefore, in order to streamline the process of document review and analysis and to

limit the number of paper copies that needed to be made, plaintiffs' counsel determined that the most cost-effective method of document management was to develop an electronic document database accessible by plaintiffs' counsel in both Atlanta and New York. (Reed Decl. ¶ 4.) Once documents were produced and loaded into this database, additional paper copies for use at depositions or as court exhibits could be printed as "blowbacks" from this system. (*Id.*) The vast majority of BME's outside copying expenses – which, at $315,253.44, make up the lion's share of the total copying costs – were payments to a third-party vendor for imaging the more than 400,000 pages of documents produced by State Defendants and third parties so they could placed into this database. (*Id.* ¶ 5.) Although this was a significant expense, had plaintiffs not used this database system, overall copying costs would have been substantially greater. (*Id.*) Plaintiffs also note that they incurred substantial costs related to imaging and producing to State Defendants documents relating to plaintiffs' experts, and that substantial additional copying of documents was required in preparing for over 60 depositions and filing and serving over 40 briefs, including the necessarily voluminous opposition to State Defendants' massive summary judgment motion. (*Id.* ¶¶ 6-7.)

Finally, plaintiffs argue that whether their copying costs are fully taxable is ultimately academic, since they are entitled to compensation for both their taxable costs pursuant to 28 U.S.C. § 1920 and their reasonable nontaxable expenses pursuant

to 42 U.S.C. § 1988. According to plaintiffs, the evidence establishes that all of these expenditures were reasonable and necessary, so even if they are not recoverable as taxable costs, they are recoverable as nontaxable expenses. In either event, the net amount owed is the same.

The Court agrees with State Defendants that the documentation submitted by plaintiffs' counsel is insufficient to permit recovery of the disputed amount as taxable costs under 28 U.S.C. § 1920. *See Breitenbach v. Neiman Marcus Group,* 181 F.R.D. 544, 546 (N.D. Ga. 1998) ("The party seeking to recover photocopy costs must come forward with evidence showing the nature of the documents copied including how they were used or intended to be used in the case."). However, the Court agrees with plaintiffs that the disputed amount is nevertheless recoverable as nontaxable expenses under 42 U.S.C. § 1988. Based on the evidence submitted by plaintiffs, the Court finds that plaintiffs' counsel exercised reasonable professional judgment in electing to set up an electronic document database to handle the voluminous documents in this case and that the costs incurred in doing so, although significant, were less than would have otherwise been reasonably required to maintain these extensive documents in paper format. The Court further finds that the copying costs incurred were fully justified in light of the large number of depositions taken and briefs filed in this case, and especially in light of the voluminous response by

plaintiffs necessitated by State Defendants' massive motion for summary judgment.

Accordingly, the Court grants State Defendants' motion for review of taxation of costs and reduces the costs taxed by the Clerk for exemplification and copies of documents from $467,323.32 to $12,999.97, which reduces the total costs taxed to $95,485.08. The balance of plaintiffs' copying costs will be allowed as nontaxable expenses recoverable under 42 U.S.C. § 1988.

C. Interest

Plaintiffs seek to recover interest on each item of expenses at the Georgia legal rate of 7% from the date the expense was incurred until the date of payment. State Defendants contend that, as a matter of law, interest on expenses runs only from the date of judgment, in this case the date the Court entered the Consent Decree, which was October 27, 2005. Plaintiffs, however, argue that pre-judgment interest is a necessary equitable component in calculating an expense award that fully and fairly compensates plaintiffs' counsel for the significant risk they incurred in undertaking this costly litigation.

Case law in this circuit is clear that interest on nontaxable expenses, as well as taxable costs, runs from the date of entry of judgment. *See BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1052-53 (11th Cir. 1994); *Ga. Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 794, 799 (11th Cir. 1988);

Lambert v. Fulton County, Ga., 151 F. Supp. 2d 1364, 1380 (N.D. Ga. 2000); *Webster GreenThumb*, 112 F. Supp. 2d at 1384. Plaintiffs have cited no authority authorizing an award of pre-judgment interest. Accordingly, the Court concludes that interest on expenses shall run from October 27, 2005.

D. Mediation Expenses

In its Order appointing Judge Beasley as mediator in this case, the Court directed that plaintiffs and defendants each bear one-half of the costs of mediation. Order of October 25, 2004. Plaintiffs contend that they are entitled to recover all mediation costs as part of nontaxable expenses recoverable under 42 U.S.C. § 1988 and ask the Court to order State Defendants to pay these costs once Judge Beasley presents her bill. State Defendants argue that plaintiffs should still bear one-half of the mediation costs in accordance with the Court's previous Order.

The costs of mediation are clearly recoverable expenses under 42 U.S.C. § 1988. *See Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) ("all reasonable expenses incurred . . . as an aspect of settlement of the case may be taxed as costs under section 1988"). The fact that the Court originally ordered the parties to share the costs of mediation is irrelevant. The costs were shared (or would have been shared had the mediator presented a bill) before this case was settled. Now that the case has been settled and the parties have agreed that plaintiffs are

entitled to recover their nontaxable expenses, plaintiffs' portion of the mediation costs is one of the items recoverable. Therefore, when the mediator presents her statement of account, State Defendants shall be responsible for paying the total amount owed in connection with the mediation between plaintiffs and State Defendants.

E. Calculation of Expense Award

In accordance with the foregoing discussion, the Court calculates the expense award as follows

Total Expenses Claimed	$1,658,341.38
Reduction for Items included in Bill of Costs	-$ 95,485.08
Reductions for Nonrecoverable Items	
Experts & Case Record Reviewers	-$ 801,864.80
Meals & Meeting Expenses	-$ 20,678.23
CRI Phone Charges	-$ 354.60
Total	$ 739,958.67

IV. Interim Award

In the event that State Defendants choose to appeal the Court's fee award in this case, plaintiffs' seek an interim award in the amount that State Defendants have conceded is reasonable: $2,971,754.52 in attorneys' fees, $189,326.08 in nontaxable expenses, and $95,485.08 in taxable costs, for a total interim award of $3,356,565.68. Plaintiffs contend

that since State Defendants have conceded that plaintiffs are entitled to these amounts, they will not be prejudiced by such an interim award. On the other hand, plaintiffs argue that since they have already invested very substantial time and money in this protracted litigation, failure to make an interim award during the pendency of any appeal will prejudice them and reward the State Defendants for alleged dilatory tactics.

The Court concludes that such an interim award would be inconsistent with the stay of monetary judgments available under Fed. R. Civ. P. 62(d). Rule 62(d) allows for a stay pending appeal as "a matter of right" if the appellant files a supersedeas bond. *United States v. Wylie*, 730 F.2d 1401, 1402 n.2 (11th Cir. 1984). Therefore, if State Defendants choose to exercise their right of appeal from this order, and if they post the required supersedeas bond, they are entitled to a stay as a matter of right. This Court has no discretion to require State Defendants to pay a portion of the amount awarded pending the completion of any such appeal. The Court notes, however, that plaintiffs will be compensated for any delay in payment occasioned by an appeal, because interest will run on the full amount of the fee and expense award from October 27, 2005, the date of entry of the Consent Decree. *See Ga. Ass'n of Retarded Citizens*, 855 F.2d at 799; *Webster GreenThumb*, 112 F. Supp. 2d at 1384.

Conclusion

As discussed above, this has been a long, complex, and difficult case. The award of plaintiffs' attorneys' fees and expenses is necessarily a large one. To a great extent, the size of the award reflects State Defendants' strategy of resistance against efforts to reform a foster care system that even they ultimately admitted was badly in need of reform. For the foregoing reasons, the Court GRANTS the parties' motions to exceed page limitations [#509, #513]; GRANTS plaintiffs' application for award of attorneys' fees and expenses of litigation [#495], as modified by the Court; GRANTS State Defendants' motion for review of taxation of costs by Clerk of Court [#512]; and DENIES plaintiffs' motion for an interim award of attorneys' fees, costs, and expenses [#516]. The Court AWARDS plaintiffs attorneys' fees in the amount of $10,522,405.08 and nontaxable expenses in the amount of $739,958.67 for a total award of $11,262,363.75. The Court DIRECTS the Clerk to enter a judgment in favor of plaintiffs and against State Defendants in this amount and for post-judgment interest at the legal rate from October 27, 2005 (the date of entry of the Consent Decree). The Court DIRECTS the Clerk to modify the costs taxed on January 18, 2006 [#518], and to tax costs in favor of plaintiffs and against State Defendants in the amount $95,485.08. Finally, the Court ORDERS State Defendants to pay the entire cost of mediation.

IT IS SO ORDERED, this 3rd day of October, 2006.

/s/
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15514

KENNY A., by his next friend
Linda Winn, et al.,

Plaintiffs-Appellees,

versus

SONNY PERDUE, in his official
capacity as Governor of the
State of Georgia, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING EN BANC

(Opinion Issued July 3, 2008)

(Filed Nov. 5, 2008)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, and PRYOR, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

/s/ J. L. Edmondson
CHIEF JUDGE

WILSON, concurring in the denial of rehearing en banc.

I concur in the Court's denial of rehearing en banc only for the purpose of responding to the dissents that follow. I believe that existing precedent regarding the discretion afforded to district judges to calculate attorney's fee awards based on the long-standing lodestar analysis is clear, and not as confusing as the dissents attempt to make it out to be. Several decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute, in the "rare" and "exceptional" case, when there is specific evidence in the record to support an exceptional result and superior performance. *See Pennsylvania v. Delaware Valley Citizens. Council for Clean Air* ("*Delaware Valley I*"), 478 U.S. 546, 565, 106 S. Ct. 3088, 3098, 92 L. Ed. 2d

439 (1986); *Blum v. Stenson,* 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

In *Blum,* the Supreme Court held that the "quality of representation" and the "results obtained" from the litigation could not serve as an independent basis for increasing the basic fee award only because the attorneys in *Blum* offered *no evidence* of an exceptional result or superior performance. *Blum,* 465 U.S. at 899, 104 S. Ct. at 1549. That is not the case here. In *Blum,* the Court indicated that the outcome would have been different had the plaintiff's attorneys "offer[ed] specific evidence" to demonstrate that an enhancement was necessary to reflect counsel's performance. *Id.* I find no language in *Blum* that can be interpreted to suggest that upward adjustments for excellent results or superior performance are categorically excluded. The Court stated that an upward adjustment may be justified in the "rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged" and resulted in "exceptional" success. *Id.*

Delaware Valley I presented the Supreme Court with a clear opportunity to overrule *Blum,* but it did not expressly do so. Rather, the Court repeatedly cited *Blum* with approval. *See Delaware Valley I,* 478 U.S. at 564, 106 S. Ct. at 3098 ("We further refined our views [regarding the proper manner in which to determine a 'reasonable' attorney's fee] in *Blum* . . . f[inding] that [the lodestar] *is presumed* to be the

reasonable fee. . . ."); *id.* at 568, 106 S. Ct. at 3100 (quoting *Blum,* 465 U.S. at 897, 104 S. Ct. at 1549) (leaving questions left open in *Blum* to be decided later). Additionally, the Supreme Court in *Delaware Valley I* echoed *Blum's* non-categorical language and conducted a case-specific analysis of the enhancement at issue. *See id.* at 566-68, 106 S. Ct. at 3099-3100.

Moreover, the Supreme Court affirmed in *Delaware Valley I* that "upward adjustments of the lodestar figure are still permissible . . . in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id.* at 565, 106 S. Ct. at 3098 (quoting *Blum,* 465 U.S. at 898-901, 104 S. Ct. at 1548-50). *See The Supreme Court, 1986 Term: Leading Cases,* 101 HARV. L. REV. 270, 293 (1987) (concluding that the *Delaware Valley I* Court "rejected the use of an enhancement based on superior attorney performance . . . absent specific evidence that the lodestar did not provide a reasonable award that reflected the quality of representation"). The dissents mischaracterize *Delaware Valley I* by ignoring this language, which precedes the Court's holding that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Id.* at 566, 106 S. Ct. at 3098. Although the Court is clear that "the overall quality of performance *ordinarily* should not be used to adjust the lodestar," the Court leaves open

the possibility of an extraordinary case. *Id.* at 566, 106 S. Ct. at 3099 (emphasis added). Reading *Blum* and *Delaware Valley I* together, the Supreme Court has consistently indicated that, in the "rare" and "exceptional" case, the district court has the discretion to grant an enhancement.

Importantly, there is no circuit split on this issue. The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits – all of the circuits that have considered this issue – agree that a district court may provide an enhancement for exceptional performance. *See Kenny A. v. Perdue,* 532 F.3d 1209, 1242 (11th Cir. 2008) (affirming a lodestar enhancement); *Geier v. Sundquist,* 372 F.3d 784, 794-95 (6th Cir. 2004) (concluding that *Delaware Valley I* permits enhancements based on quality of representation and results obtained in rare and exceptional cases); *Van Gerwen v. Guarantee Mut. Life Co.,* 214 F.3d 1041, 1046 (9th Cir. 2000) (stating that, as in *Blum* and *Delaware Valley I,* upward adjustment for quality of representation "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and that the success was exceptional"); *Quaratino* [sic] *v. Tiffany & Co.,* 166 F.3d 422, 425 (2d Cir. 1999) ("The lodestar may be adjusted based on several factors, including in particular the results obtained. . . .") (internal quotation marks and citation omitted)); *Forshee v. Waterloo Indus., Inc.,* 178 F.3d 527, 532 (8th Cir. 1999) (stating that, to justify enhancement for outstanding service and results, the

applicant "must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended") (internal quotation marks and citation omitted)); *Hyatt v. Apfel,* 195 F.3d 188, 192 (4th Cir. 1999) (affirming enhancement "on account of the exceptional results obtained . . . "); *Roe v. Cheyenne Mountain Conference Resort, Inc.,* 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) ("The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional."); and, *Shipes v. Trinity Indus.,* 987 F.2d 311, 320 (5th Cir. 1993) (noting that upward adjustments based on quality of representation and results obtained are proper where supported by specific evidence on record and detailed findings by lower courts).

The discretion to enhance an attorney's fee is a tool uniquely within the province of the district judge. The district judge has an unparalleled opportunity to observe the attorney's performance in a given case. Only the district judge can evaluate the attorney's performance from the day he or she files the complaint to the day the judge enters the order. Before arriving at its decision in this case, the district judge set forth detailed findings to explain why the lodestar figure did not fully reflect the quality of representation and the results achieved.

Judge Tjoflat's dissent mischaracterizes the district court's observations and findings in its published

order as "testimony." These findings and observations are simply explanations for the enhancement, provided because *Blum* and *Delaware Valley II* require that an enhancement be justified. This is not a due process violation. The district judge explained that he was motivated to enhance by his "own substantial experience and familiarity with the prevailing rates in Atlanta, and the Court's observation of the stellar performance of plaintiffs' counsel throughout this long and difficult case," including the court's "58 years as a practicing attorney and federal judge." *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1286, 1290 (2006). The district judge is in the best position to evaluate trial level advocacy, and therefore is in the best position to identify when that advocacy is exceptional. Although we review the district court's decision for an abuse of discretion, we should afford the district court the deference and discretion to which it is entitled.

We need not disturb our precedents in *Norman v. Housing Auth. of Montgomery*, *NAACP v. Evergreen*, and *Kenny A.* because they are consistent with existing Supreme Court precedent. *Kenny A.*, 532 F.3d at 1242; *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988); *NAACP v. Evergreen*, 812 F.2d [sic] 1332, 1336-37 (11th Cir. 1987) (per curiam). Our decisions are also consistent with every other Circuit that has considered whether, and to what extent, exceptional performance and results can be used to enhance an attorney's fee under the lodestar calculation. The Supreme Court has

instructed that a district judge should only do so in an exceptional case when there is specific evidence to support it. *Kenny A.* is that case.

TJOFLAT, Circuit Judge, dissenting from the denial of rehearing en banc:

In this case, the district judge, in undertaking the task of awarding attorney's fees to the prevailing plaintiffs under a federal fee-shifting statute, 42 U.S.C. § 1988,[1] decided to testify on behalf of the plaintiffs and did so *ex parte,* without notice to the defendants, in the form of statements made in the order he entered granting plaintiffs the fees they

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[1] Plaintiffs' amended complaint, the pleading that contained all of the claims for relief, contained 18 counts, 15 of which stated causes of action. Nine of the counts sought relief under the Georgia constitution, Georgia statutes, or common law. Six of the counts sought relief under 42 U.S.C. § 1983 for violations of the United States Constitution or federal statutes. Section 1988 applied only to those six counts. The consent decree the court signed does not indicate whether the decree was based on state or federal law. I assume that it was based on one or more of the § 1983 counts. In granting plaintiffs attorney's fees under § 1988, neither the parties nor the court appeared to have segregated out the time plaintiffs' counsel spent litigating the state law causes of action. Rather, they assumed that all of the time for which plaintiffs' counsel asked to be compensated dealt with the § 1983 claims. In extolling counsel's performance as far superior to anything he had witnessed in his 27 years on the district court, the district judge did not comment on, and apparently did not take account of, counsel's performance in prosecuting plaintiffs' state law claims.

requested.[2] Based on these statements – in which he compared plaintiffs' counsel's performance and the comprehensiveness of the injunction the court entered with other cases that he declined to identify – the judge enhanced plaintiffs' fee request by a multiplier of 1.75. *Kenny A. ex rel. Winn v. Perdue,* 454 F. Supp. 2d 1260 (N.D. Ga. 2006) ("*Kenny A. III*"). On appeal, the panel accepted the judge's statements as probative evidence of the quality of counsel's performance and the result plaintiffs achieved,[3] and, concluding that it was bound by precedent, *NAACP v. City of Evergreen,* 812 F.2d 1332 (11th Cir. 1987) (per curiam), and *Norman v. Housing Auth. of the City of Montgomery,* 836 F.2d 1292 (11th Cir. 1988), upheld the 1.75 fee multiplier. *See Kenny A. ex rel. Winn v.*

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[2] It is clear from a reading of the district judge's order granting plaintiffs' attorney's fees request that the district judge served as plaintiffs' witness. He provided the testimony that was critical and essential to the fee enhancement. *See Kenny A. ex rel. Winn v. Perdue,* 454 F. Supp. 2d 1260, 1288-90 (N.D. Ga. 2006).

[3] Judge Carnes authored the panel's majority opinion; however, part VI of the opinion, 532 F.3d at 1220-42, which addressed the district court's fee enhancement, represented his views alone. *Kenny A. ex rel. Winn v. Perdue,* 532 F.3d 1209, 1220 n.3 (11th Cir. 2008). Judge Hill, who joined the remainder of Judge Carnes's opinion, voted to affirm the fee enhancement solely "because we are bound" by *NAACP* and *Norman*. *Id.* at 1251 (Hill, J., concurring). None of the three panel opinions referred to the district judge's statements as testimony given *ex parte* and without notice or questioned whether those statements were unreviewable. Yet the panel necessarily accepted the statements as probative evidence; otherwise, the panel could not have reached the result it did.

Perdue, 532 F.3d 1209, 1236-37 (11th Cir. 2008) ("*Kenny A. IV*"); *id.* at 1246 (Wilson, J., specially concurring); *id.* at 1251 (Hill, J., concurring). In my view, neither *NAACP* nor *Norman* compelled the result the panel reached, nor, as Judge Carnes's panel opinion argues, should they have.

I dissent from the court's failure to take this case en banc. In light of the numerous fee-shifting statutes that Judge Carnes has cited in the appendix to his dissenting opinion, the panel's reading of *NAACP* and *Norman,* which I believe goes beyond the cases' holdings, will control the litigation of attorney's fees issues in this circuit. But there are reasons other than the panel's reading of *NAACP* and *Norman* that require the full court's attention en banc – reasons independent of those Judge Carnes advances.

If my reading of *NAACP* and *Norman,* as set out in part I, is correct, the district court's decision should be vacated and the case remanded to the district court. I would vacate the court's decision on two independent grounds: (1) the decision is unreviewable; and (2) the manner in which the court used its own testimony to enhance plaintiffs' attorney's fees request denied the defendants due process of law.

If my reading of *NAACP* and *Norman* is wrong, and their holdings required the panel to affirm, en banc review is still necessary to determine whether – in a case seeking the sort of injunctive relief plaintiffs sought and obtained in this case – quality of performance and the result obtained are permissible grounds

for enhancing a lodestar fee that already incorporates an hourly rate at the top of the relevant market for the type of services performed. I contend in part III that an enhancement on these grounds is not available in cases like the one before us.

I.

In *NAACP*, we vacated and remanded the district court's decision refusing to grant an attorney's fee enhancement. We did so due to ambiguities in the district court's stated bases for denying the enhancement and the court's failure to address plaintiffs' "exceptional success" justification for a fee enhancement. *NAACP*, 812 F.2d at 1336-37. In *Norman*, we reversed and remanded the district court's refusal to enhance the attorney's fee award because the court used the wrong standard in assessing the significance of the results the plaintiffs had obtained. *Norman*, 836 F.2d at 1306.

While we did assume in those cases that, at least theoretically, "superior results coupled with superior performance *can* be the basis for an enhancement of the lodestar amount," *Kenny A. IV*, 532 F.3d at 1238 (emphasis added), in neither case did we hold that fee enhancements granted on those grounds must be affirmed. We certainly did not hold that a district court would not be abusing its discretion if it enhanced an attorney's fee award on the basis of exceptional performance or result, particularly where, as here, the court relied almost exclusively

on unidentified and unreviewable personal experience, rather than specific evidence in the record, in reaching its determination. *See Blum v. Stenson*, 465 U.S. 886, 899, 104 S. Ct. 1541, 1549, 79 L. Ed. 2d 891 (1984) (requiring "specific evidence" to support an enhancement based on superior service and exceptional success). If, as Judge Carnes's panel opinion "readily" concluded, "the district court's award of a $4,500,000 enhancement to the lodestar amount in this case is an abuse of discretion," then *NAACP* and *Norman* present no impediment to vacating the fee award. *Kenny A. IV*, 532 F.3d at 1236.

Because, however, the panel relied on the supposedly preclusive effect of *NAACP* and *Norman*, the panel gave those decisions greater precedential value than they deserve, by their own terms, in the future review of fee enhancements. Should the panel's decision stand, there would be almost no room for a panel of this court to find that a district court abused its discretion in granting a fee enhancement on the basis of the lawyer's purportedly superior performance or the result attained. For this reason alone, we should hear this case en banc to clarify and limit the reach of *NAACP* and *Norman* so that future courts will not mistakenly find their precedential effect so constraining.

II.

If my reading of *NAACP* and *Norman* is correct, the district court's decision should be vacated and the

case remanded to the district court. As I explain in subparts A and B, the decision is unreviewable and is the product of the denial of due process of law.

A.

The district court's decision to enhance the lodestar in this case through the use of a multiplier of 1.75 ultimately was driven by the court's personal experience and subjective relative assessment of the lawyers' performance.[4] Specifically,

> based on its *personal observation* of plaintiffs' counsel's performance throughout this litigation, the Court [found] that the superb quality of their representation *far exceeded what could reasonably be expected for the standard*

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[4] The district court also purported to rely on the following factors as evidence that the lodestar calculation failed to account for the quality of service rendered by plaintiffs' counsel: (1) that counsel were required to advance case expenses of $1.7 million with no ongoing reimbursement; (2) that counsel were not paid on an ongoing basis as the work was performed; and (3) that counsel's ability to recover any fee or expense reimbursement was contingent on the outcome of the case. *Kenny A. III*, 454 F. Supp. 2d at 1288. Judge Carnes, correctly in my view, noted why none of these factors are legally permissible bases for a fee enhancement. *Kenny A. IV*, 532 F.3d at 1225-28 (relying on *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986), and *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)). This leaves the district court's personal views of plaintiffs' counsel's performance and the result plaintiffs obtained as the only remaining bases for the enhancement. *Id.* at 1228-29.

> *hourly rates* used to calculate the lodestar. Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys *in any other case* during its 27 years on the bench.[5]

Kenny A. III, 454 F. Supp. 2d at 1288-89 (emphasis added). Along similar lines, the district court commented that "the quality of service rendered by class counsel . . . was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation." *Id.* at 1288. The court further opined "that plaintiffs' success in this case

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[5] The district court's lodestar enhancement surely cannot stand to the extent that it was based on counsel's "commitment, dedication, and professionalism" displayed in the litigation. These attributes are *always* required of officers of the court, and attorneys should never be compensated – let alone compensated *extra* – merely for comporting themselves in a manner expected of all members of the bar, regardless of the fee charged for their services. *See, e.g.*, Ga. State Bar R. & Regs., Rule 4-102, Rules of Prof'l Conduct, Preamble & Rules 1.1 (Competence), 1.3 (Diligence), 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 3.5 (Impartiality and Decorum of the Tribunal); *see also* LR 83.1(C), NDGa ("All lawyers practicing before this court shall be governed by and shall comply with the specific rules of practice adopted by this court and, unless otherwise provided, with the Georgia Rules of Professional Conduct contained in the Rules and Regulations of the State Bar of Georgia and with the decisions of this court interpreting these rules and standards.").

was truly exceptional." *Id.* at 1289. Indeed, the court continued, "[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

The district judge arrived at the fee enhancement by comparing counsel's performance and the result obtained in this case with the attorneys' performance and the result plaintiffs obtained in other cases. The court did not identify the other cases, the comparators, but I assume that they were cases over which the district judge presided and that they were class actions in which the plaintiffs sought equitable relief as sweeping, or nearly so, as what plaintiffs sought in this case. Indulging this assumption, the judge's statements regarding the quality of counsel's representation and the result plaintiffs achieved invite a multitude of questions, none of which the judge answered, including:

- What quality of representation would "consumers of legal services in the legal marketplace in Atlanta" have expected to receive for the rates used in the lodestar the district judge fixed in this case?
- What cases was the district judge using as comparators? Were they cases in which the attorneys claimed a far lower fee? (If so, counsel in this case should have been expected to bring "a higher

degree of skill" to their task in order to earn the higher requested hourly rate.)

- What definition of "success" did the court use?
- What level of success did plaintiffs' counsel achieve in the comparators? Assuming that the level of success they achieved was lower than what counsel achieved in this case, why was it so?

The district judge provided no clue as to the answers to these questions. Accordingly, the critical portions of the record for review – the specific evidentiary facts on which the decision turned – do not exist. It is well-established that "no enhancement is permissible unless there is *specific evidence in the record* to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed." *Norman*, 836 F.2d at 1302 (citing *Blum*, 465 U.S. at 899, 104 S. Ct. at 1549) (emphasis added). A district judge's mental impressions that are based on unknown facts cannot be reviewed.[6]

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[6] While we have previously suggested that a district judge may base a fee enhancement decision on his own knowledge and experience, *see Norman*, 836 F.2d at 1303, this option, even if properly available, does not relieve the judge of the obligation of identifying on the record the specific facts supporting the enhancement decision, *see Blum*, 465 U.S. at 899, 104 S. Ct. at 1549 (requiring "specific evidence" to support an enhancement based on superior service and exceptional success). Here, the district judge relied only on generalized, conclusory findings.

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B.

The district judge provided the critical evidence that plaintiffs needed to obtain an enhancement of the lodestar that they proposed and that the court accepted as full compensation for services rendered. The evidence was testimonial and was given *ex parte* and without notice to the defendants.[7] In arriving at his fee-award decision in this manner, the judge

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keeping the factual premises of those findings locked away inside his personal recollection, shielded from challenge or appellate review. Such conclusions are insufficient to support an enhancement.

[7] I have not overlooked the possibility that the district judge, in comparing the quality of counsel's performance and the result plaintiffs attained with the quality of attorney performance and the result attained in the comparator cases, was effectively taking judicial notice of the quality of performance and result in those other cases. If that is what the judge was doing, it is no less troubling than his *ex parte* testimony is.

First, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Clearly, the issues here are subject to reasonable dispute, and the accuracy of the court's determination of the relative merits of plaintiffs' counsel's performance and the result as compared to other cases can be, and have been, questioned. Second, the district judge afforded the defendants no opportunity to be heard, as required by Fed. R. Evid. 201(e), "as to the propriety of taking judicial notice and the tenor of the matter noticed." In sum, not only were the facts of which the judge may have taken judicial notice not proper subjects of such notice, but the court denied the defendants the procedural protections guaranteed by the rules of evidence.

denied defendants fundamental due process of law. "[I]t is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party." *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).[8] The district judge was required to afford defendants the right of cross-examination and, depending on what cross-examination might disclose, an opportunity to put on rebutting evidence.[9] It is obvious to me that the

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[9] In theory, defendants could have exercised their right of cross-examination had they moved the court pursuant to Fed. R. Civ. P. 59 for a new trial. Rule 59(a)(2) provides,

> ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

An attorney's fee hearing under a fee shifting statute is essentially a nonjury trial limited to the issue of fees. Therefore, Rule 59(a)(2) provides a mechanism by which a defendant, ambushed by previously-undisclosed judicial testimony in the dispositive fee order, could obtain a re-opening of the proceedings in order to cross-examine the new witness (the judge), introduce rebuttal evidence if necessary, and obtain new findings of fact and conclusions of law on the basis of a record so augmented. If the judge granted the Rule 59(a)(2) motion, the defendant would no doubt follow with a motion for recusal unless the judge recused *sua sponte*. Whether a defendant in a case such as the one at hand must resort to Rule 59(a)(2) relief in order to preserve its argument that the court's utilization of

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district judge failed to comprehend the due process implications of what he was doing. Had he been aware of those implications, he would have been faced with two choices: he could (1) announce his intent to testify as a plaintiff's witness; or (2) put aside his personal opinion of counsel's performance and the result attained and, instead, point to other specific evidence in the record as the bases for his attorney's fees decision.

The first choice would have required his recusal from the case. When a judge becomes a material witness in a case over which he is presiding, he must recuse and let another judge take over. The judicial disqualification statute provides, in pertinent part, as follows:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself

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its own *ex parte* testimony, given without notice, operated as a denial of due process is open to question. I would answer the question in the negative for two reasons: (1) a motion for a new trial is not a prerequisite for the direct appeal of the attorney's fees decision; therefore, such a motion is not necessary to preserve the due process issue this case presents; and (2) the scenario associated with processing the new trial motion would likely be unpleasant. In this case, defendants have not asserted the denial of due process as a basis for disturbing the district court's attorney's fees decision. The issue is, however, inextricably intertwined with the question of whether the court's decision is unreviewable for the reasons I have posited, and defendants were not required to assert in their principal brief that the decision under review is unreviewable. Unreviewability is a matter the court of appeals notices on its own initiative.

> in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C. § 455(a), (b)(1). Where, as here, the district judge feels compelled to testify – here as a plaintiff's witness – to his personal knowledge and experience, the judge clearly has, and has chosen to offer, "personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b)(1). Whether, in addition, the judge actually has a personal bias or prejudice in favor of the party whom his testimony benefits is less clear, although the judge's opinion here is replete with unrestrained and glowing praise for plaintiffs' counsel, suggesting a distinct possibility of such bias or prejudice. But, by testifying on behalf of a party, there is little doubt that, at a minimum, the judge's impartiality might reasonably be questioned. *Id.* § 455(a). In such a circumstance, the need for recusal is clear.

III.

In this part, I assume that my reading of *NAACP* and *Norman* is wrong and that their holdings required the panel to affirm the enhancement of the

lodestar by a multiple of 1.75. En banc review would still be necessary to explore the proposition that quality of performance and result may be employed in a class action brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure to enhance a lodestar already reflecting an hourly rate prevailing at the top of the relevant market. I contend that neither factor would be an appropriate basis for an enhancement. I consider first the result reached, then the quality of performance.

A.

Aside from the procedural deficiencies associated with the lodestar enhancement in this case, it appears to me that an attorney's fee enhancement based on "exceptional" or "superior" results can never be appropriate in a class action, like this one, in which plaintiffs sought sweeping equitable relief.[10] Assuming that a court sitting in equity properly discharges

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[10] Comparing class actions seeking equitable relief, as in this case, with class actions seeking money damages is like comparing apples and oranges. In granting equitable relief, the district court is concerned with whether the injunction it enters is narrowly tailored to provide only such relief as is necessary to prevent the future repetition of the legal wrong the court has found and whether the injunction is enforceable through the court's contempt power. In approving the settlement of a damages action, the court is not faced with those concerns. Rather, its concern is with the fairness of the settlement to all parties. In a money damages case, once the settlement is approved, the court is no longer involved.

its function in entering a just and legally appropriate injunction, whether following a bench trial or after consideration of a consent decree crafted by the parties, there can be but one qualitative result; in no such case can one result be any more "exceptional" than, or "superior" to, another.

In any case in equity, such as the Rule 23(b)(2) class action at hand, the judge, sitting as a chancellor, has an obligation to do justice under the circumstances. *See Coral Springs Street Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1340 (11th Cir. 2004) ("It is a bedrock principle of courts of equity that they may impose the substantive remedy of injunctive relief *only* when fundamental fairness and justice demand it." (emphasis in original)). The court can reach its judgment in one of two ways. It can hold a nonjury trial, in which case the court has all of the evidence before it and the opportunity to engage the witnesses and the attorneys in an effort to muster the information necessary to fashion an appropriate injunction. Alternatively, the court can enter a consent decree, in which case it must rely heavily on the competence of counsel to craft a legally appropriate injunction.

Under either approach – a bench trial or a consent decree -- the court's obligation is the same. First, the final judgment must be fair and just under the circumstances. Second, because the decree will be enforced through the court's civil contempt power, the decree's injunctive provisions must be enforceable, meaning capable of feasible enforcement. To the extent they are not, the provisions should not be

entered, as the issuance of an injunctive order that cannot be enforced breeds disrespect for the rule of law. Thus, in considering whether to enter a consent decree, a court must ask itself the same questions it would ask in assessing the adequacy and propriety of its own order after finding for the plaintiffs at the end of a bench trial: Are the injunctive provisions to be entered not only fair and just under the circumstances, but are they also capable of enforcement through the court's civil contempt power? Do they reach only as far as is necessary to right the wrong, to give the plaintiffs the relief to which they are legally entitled but not more? Are they tailored as narrowly as is necessary to effect the appropriate relief?

This evaluative rubric will produce one of three qualitative assessments: (1) the order will do justice and give the plaintiffs what the law allows; (2) the order will give the plaintiffs more relief than the law allows, which is plainly improper;[11] or (3) the order

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[11] If, in a given case, a proposed consent decree would afford the plaintiffs a level of relief greater than they would be entitled to receive under a decree the court would fashion – because the consent decree would give the plaintiffs more than the law would allow – the district court should not approve the decree. In the case before us, the district court indicated that the consent decree may have provided plaintiffs with more than the law would allow. *See Kenny A. III*, 454 F. Supp. 2d at 1289-90 ("Indeed, the Court has previously recognized that even if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree."); *see also Kenny A. IV*, 532 F.3d at 1230 ("To the extent that the

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will provide less relief than the law allows, which would be unconscionable and unjust. Every entered injunctive order or decree should fall into the first category; a court should never enter an order or approve a consent decree falling into the second or third category. Accordingly, in any given equitable case, there can be but one legally proper result.

In this case, we must assume that the consent decree approved by the district court was prepared by competent counsel on both sides and was crafted to be just and legally appropriate under the circumstances, affording the plaintiff class no more and no less than that to which it was legally entitled. Were this not the

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district court rewarded plaintiffs' counsel with an enhancement for obtaining better results than the class would have received had the case been resolved on the merits, that is plainly wrong. . . . [T]he fee shifting statutes are not designed to provide representation that will win plaintiffs more than a correct application of substantive and remedial law entitles them to receive. . . . To put it in an either-or manner, superb results are either what a fair application of the law produces, which means that they are not truly 'superb,' or they are results that exceed what the law allows and for that reason are beyond the purpose of the fee-shifting statutes."). Thus, no fee award, whether or not enhanced beyond an appropriately-calculated lodestar, should ever exceed fair market compensation for obtaining the maximum level of relief to which the client is legally entitled. Applied to the present context, if any of the unidentified comparator cases contemplated by the district court involved (1) receipt by plaintiffs of all the relief allowed by law, yet (2) no lodestar enhancement of the attorney's fees, then the lawyers here, who necessarily provided their clients no more "exceptional" a result, should not do any better in terms of fees on the basis of the result obtained in the litigation.

case, the district court would not – and should not – have approved it. It is against this necessary background assumption that we must review whether the result the consent decree provided could ever be deemed "exceptionai" or "superior" relative to the result the district court would have fashioned had it tried the case or the results reached in other comparable cases. As a matter of law and logic, it cannot.

"Exceptional" has been defined as "constituting, or occurring as, an exception; not ordinary or average; esp., much above average in quality, ability, etc." *Webster's New World Dictionary* 473 (3d college ed. 1988). "Superior" means "greater in quality or value than . . . above average in quality; excellent." *Id.* at 1344. The result in one case can only be deemed "exceptional" or "superior" in relation to the result the district judge would have fashioned had he tried the case to a conclusion or the result he approved or fashioned in an appropriate comparator case. A proper comparator case in this situation would be another Rule 23(b)(2) class action seeking equitable relief.[12]

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[12] The ideal comparators in this case would also involve broad injunctive remedies in which the court placed numerous affirmative obligations on governmental service bureaucracies. However, because all injunctive relief, no matter how sweeping or detailed, must meet the same equitable criteria and any such case can have but one legally-appropriate result, the inexorable conclusion that no properly-crafted injunctive remedy can be any more "exceptional" than or "superior" to the next applies regardless of what type of equity case serves as the comparator.

However, assuming, as we must, that a comparator case involved an order or consent decree whose injunctive provisions both (1) were fair and just under the circumstances, affording the plaintiffs all the relief to which they were legally entitled but no more, and (2) were feasibly enforceable, it is hard to see how the result in this case could be qualitatively "superior" or "exceptional." Indeed, were a district court to have found the result in the case before it to be "exceptional" or "superior" relative to comparator cases, it necessarily would have to conclude that the injunctions in the other cases were unconscionable, unjust, or unenforceable and, *ipso facto,* should never have been entered.

In this case, in which the district judge presumably relied on comparator cases from his own body of judicial experience, his finding that the result in this case was "exceptional" and "superior" enough to justify a fee enhancement implicitly denigrates his own prior judgments by suggesting that they failed to satisfy the standard for proper equitable relief and that he never should have entered them. I am unwilling to assume that the district judge erred in deciding those prior cases – nor could I reach such a conclusion in any event because, as the district judge has not disclosed which other cases he was considering, I have no way to know which decisions to evaluate. Therefore, I have to assume that the injunctive relief awarded in the comparator cases was every bit as just, fair, and enforceable as the relief in this case and, accordingly, no less "exceptional."

The upshot is that, in the context of equitable relief, no properly-crafted injunction can be more "exceptional" than or "superior" to any other. As such, it can never be appropriate to enhance the attorney's fees in a case seeking injunctive relief on the basis of "exceptional" or "superior" results.

B.

In light of what the Supreme Court has said regarding the proper composition and function of the lodestar,[13] I am convinced that the district court was precluded from enhancing the admittedly adequate lodestar on the basis of counsel's performance. "[T]he lodestar figure includes most, if not all, of the

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[13] Judge Carnes's panel opinion canvasses, accurately I believe, the Supreme Court's pronouncements about the composition and function of the lodestar. *See Kenny A. IV*, 532 F.3d at 1220-24. In a nutshell, the Court has long advised that the lodestar – the "product of reasonable hours times a reasonable rate" – "is presumed to be the reasonable fee contemplated by [42 U.S.C.] § 1988." *Blum*, 465 U.S. at 897, 104 S. Ct. at 1548. The Court has further emphasized that "[a] *strong* presumption that the lodestar figure . . . represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute." *Del. Valley*, 478 U.S. at 565, 106 S. Ct. at 3098 (emphasis added). In addition, fee shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys. . . . Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Id.* In other words, the lodestar is intended to provide full compensation for the legal services rendered, but no more than that.

relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Pennsylvania v. Del. Valley Citizen's Council for Clean Air,* 478 U.S. 546, 566, 106 S. Ct. 3088, 3098, 92 L. Ed. 2d 439 (1986). The lodestar is normally already assumed to account for the difficulty and cost of the case and the performance rendered by the attorney. The proper way to account for attorney performance is in setting the hourly rate, not in enhancing the lodestar.

In the case at hand, however, there is evidence that, in calculating the lodestar, the district court used hourly rates already at the top of the relevant market for the type and character of legal services performed. Neither the Supreme Court nor this court has addressed the question of whether a performance-based fee enhancement may push the lodestar hourly rate above the upper end of the prevailing market rate. If it may, then the resulting lodestar would yield a fee higher than necessary to serve the purposes of the fee shifting statutes – fairly compensating attorneys for the work performed, but only at a rate high enough to ensure their clients' access to legal services. Therefore, I believe that a lodestar hourly rate that is already at the top of the relevant market is simply ineligible for an additional enhancement.

A fee enhancement might conceivably be appropriate where an attorney quotes his client an hourly

rate at the outset of the case, and later submits that rate to the court as his reasonable rate, yet that hourly rate ultimately proves to be insufficient in light of what the case in fact required the attorney to do.[14] Perhaps in the beginning the attorney did not accurately predict or appreciate how much time or effort the case would require, the level of resources he would have to devote, or the complexity of the issues that would arise. In short, an attorney who finds himself in over his head, stuck with an inadequate hourly rate, may be able to warrant relief in the form of a fee enhancement in order to obtain full and fair compensation for the work actually performed.

The situation is very different, however, when, as should more typically be the case, the attorney does not request an hourly rate until the end of the litigation and the submission of the fee application. At this stage, the attorney already knows how much time, skill, effort, and expense he has devoted to the case. With this knowledge, he is able to determine the combination of hours and hourly rate that will compensate him adequately for his services, in light of the results obtained and the prevailing rates in the relevant market for comparable legal services. Attorneys know how to value their own services, and this fully compensatory rate is the one that the attorney

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[14] I assume a case in which the requested hourly rate was somewhere below the top of the relevant market and even the enhanced hourly rate would not exceed an hourly rate prevailing at the upper end of the market.

should request. Having already included every factor properly bearing on compensation – including the degree of the attorney's performance and the results obtained in the litigation – there is no need or justification for an enhancement on top of this. Anything over and above this fully and fairly compensatory fee, to be candid, could only be the product of the attorney's greed or the judge's favoritism. Neither ground is, or should be, permitted under the fee shifting statutes or sanctioned by this court.

IV.

I conclude where I began. The court ought to rehear this case en banc for reasons aplenty.

CARNES, Circuit Judge, dissenting from the denial of rehearing en banc, in which TJOFLAT and DUBINA, Circuit Judges, join:

Although I have been on the short end of en banc votes before, this is the first time in sixteen years on the bench that I have written, or even joined, a dissent from the denial of rehearing en banc. I take this unusual step to explain why I believe that in this case "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court." Sup. Ct. R. 10(c).

The important, unresolved question this case presents is one that affects the proper application of

at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party. In arriving at an attorney's fee award, a district court calculates a lodestar amount by multiplying the reasonable number of hours worked, which reflects the difficulty of the case, by an hourly rate that fully reflects the attorney's skill and experience. *See Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563, 106 S. Ct. 3088, 3097 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983). The question is whether a district court can then increase the award beyond that reasonable amount based on its finding that the attorney's performance was of superior quality and the results achieved were exceptional.

My court of appeals has answered that question "yes" in this case by affirming the district court's judgment, which included a $4.5 million enhancement based on a number of factors, the most important of which were what the district court found to be superior performance and exceptional results. *Kenny A. ex rel Winn v. Perdue*, 532 F.3d 1209, 1218 (11th Cir. 2008) (majority opinion);[1] *id.* at 1225, 1242

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[1] Judge Hill joined Parts I-V and VII of the lead opinion, which I authored, making those parts a majority opinion. *See id.* at 1220 n.3. Neither he nor Judge Wilson joined Part VI of the lead opinion, and for that reason I refer to it as a concurring opinion by me. Although Part VI of the lead opinion is not part of the majority opinion, the pronoun "we" was used throughout it for continuity purposes.

(Carnes, J., concurring); *id.* at 1247, 1249 (Wilson, J., concurring); *id.* at 1251 (Hill, J., concurring); *see also Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1288-90 (N.D. Ga. 2006). The performance and results component was so important to the district court's enhancement decision that we declined to vacate and remand the enhancement on other grounds, concluding that it would be futile to do so given the primacy of that component. *Id.* at 1242 (Carnes, J., concurring) (recognizing that the district court improperly took contingency and other factors into account but explaining that it would be futile to remand on those grounds because "[t]he district court was so obviously enamored with the performance of plaintiffs' counsel and with the result that they achieved, and so determined to reward them for it, that we have no doubt the court would simply reinstate the enhancement"); *see also id.* at 1242, 1248 (Wilson, J., concurring) (agreeing that the district court should not have considered the contingency factor in making its enhancement decision but voting to affirm the full amount of the enhancement anyway).

Two of the three judges on the panel voted to affirm the multi-million dollar enhancement part of the fee award in this case because they were bound to follow established circuit law that a district court may take a reasonable attorney's fee award and enhance it for what the court views as extraordinary performance and results. *Id.* at 1236-38 (Carnes, J., concurring); *id.* at 1251 (Hill, J., concurring); *see*

generally Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988); *NAACP v. City of Evergreen,* 812 F.2d 1332, 1336-37 (11th Cir. 1987). The third judge on the panel voted to affirm the enhancement both because binding circuit law permits it and because he reads *Blum v. Stenson,* 465 U.S. 886, 104 S. Ct. 1541 (1984), as "establish[ing] that enhancements for quality of representation and exceptional results, while not warranted in most cases, are permissible where supported by specific evidence." *Kenny A.,* 532 F.3d at 1243, 1246 (Wilson, J., concurring).

The Supreme Court speculated on this issue in the *Blum* case, but the facts did not present it. There was no specific evidence in that case to support the district court's conclusory findings that, among other things, the quality of legal services was superior to what one should reasonably expect and that the results obtained were exceptional. *Blum,* 465 U.S. at 898-99, 104 S. Ct. at 1548-49.

The Court reversed the enhancement in the *Blum* case. *Id.* at 902, 104 S. Ct. at 1550. Therefore, what the *Blum* decision establishes, and all that it establishes, is that absent specific evidence and findings an enhancement for the quality of representation or results obtained is not permitted. *See id.* at 901-02; 104 S. Ct. at 1550; *see also Kenny A.,* 532 F.3d at 1221-22 (Carnes, J., concurring).

The *Blum* case does not establish as law the proposition that with specific evidence and findings

an enhancement for superior representation and exceptional results is permissible. It could not. A decision in a case where particular facts are not present cannot establish the law governing cases where those facts are present. Any statements, and certainly any implications from statements, in the *Blum* opinion about what might have been the result if the facts had been different are nothing more than dicta. *See Cohens v. Virginia,* 6 Wheat. 264, 399-400, 19 U.S. 264 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.") (Marshall, C.J.); *United States v. Santos,* 553 U.S. ___, 128 S. Ct. 2020, 2031 (2008) (plurality opinion) (speculations that address a case not before the Court "are the purest of dicta"); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. ___, 127 S. Ct. 2738, 2762 (2007) (plurality opinion); *Cent. Va. Cmty. Coll. v. Katz,* 546 U.S. 356, 363, 126 S. Ct. 990, 996 (2006).[2]

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[2] There is this passage in the *Blum* opinion:

> [W]e reiterate what was said in *Hensley*: "where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified." *Hensley*, 461 U.S., at [435], 103 S. Ct., at 1940. We

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> therefore reject petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988.

Blum, 465 U.S. at 901, 104 S. Ct. at 1550 (footnote omitted). The speculative "may be" language is "the purest of dicta," *Santos*, 128 S. Ct. at 2031 [sic] (plurality opinion), because the enhancement in *Blum* was reversed instead of affirmed. The quote from *Hensley* is itself the purest of dicta because that case involved the reduction of an attorney's fee award for partial success, not the enhancement of one for more success than was expected. *Hensley*, 461 U.S. at 426, 103 S. Ct. at 1935-36.

For what it is worth, I agree with the literal statement in the dicta of the last sentence of the quote from *Blum*, which rejects the argument that an upward adjustment of a fee award is never appropriate. While I believe that enhancements are never appropriate for superior performance and exceptional results, *see Kenny A.*, 532 F.3d at 1220-42 (Carnes, J., concurring), they may well be appropriate in other situations, especially those involving unpopular clients or causes where the attorney suffers from the representation in ways not compensated by the lodestar. *Id.* at 1233-34 (giving three examples); *see also Guam Soc. of Obstetricians and Gynecologists v. Adam*, 100 F.3d 691, 698-99 (9th Cir. 1996) (concluding that enhancement was appropriate where case was extremely controversial and attorney received death threats during the course of the litigation). No one contends that this is a case where the clients were detested, the litigation was unpopular, or the attorneys' standing in their profession or community suffered in the least. In fact, just the opposite is true. *Kenny A.*, 532 F.3d at 1234-35 (Carnes, J., concurring); *cf. Applegate v. United States*, 52 Fed. Cl. 751, 773 (Fed. Cl. 2002) (reversing judgment awarding enhancement where "the facts here demonstrate that [plaintiffs' counsel] was not prosecuting an unattractive case, but rather pursuing a cause *Celeb* – the type of case that a firm with local roots likely would embrace and seek to publicize to its clients and prospective clients as an indication of its community involvement").

The Supreme Court had another go at the issue two years later in the *Delaware Valley* case. The court of appeals had affirmed an enhancement based in part on the superior quality of the representation and the exceptional nature of the success achieved. *Delaware Valley,* 478 U.S. at 554-56, 106 S. Ct. at 3093-94. The Supreme Court held that the enhancement was improper. *Id.* at 567-68, 106 S. Ct. at 3099-3100. In explaining why, the Court made statements indicating that it was categorically ruling out enhancements for superior performance and by extension superior results. *See id.* at 564-66, 106 S. Ct. at 3098-3100. For example, the Court stated that the special skill and experience of counsel, the quality of representation, and the results obtained "are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Delaware Valley*, 478 U.S. at 565, 106 S. Ct. at 3098. And the Court said this about superior performance enhancements: "In short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Id.* at 566, 106 S. Ct. at 3098; *see also id.* at 566, 106 S. Ct. at 3099 ("[T]he overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'").

Those categorical statements are clear, and if the *Delaware Valley* Opinion's discussion had ended there

everyone would agree that this type of enhancement had been categorically ruled out. The problem is that the discussion did not end with those statements. Instead, there was a "furthermore." After explaining why the quality of the performance or the results obtained cannot serve as bases for enhancing the fee award, the Court stated that "[f]urthermore" there was neither specific evidence nor specific findings in that case about why the results were so outstanding or why the quality of representation was not fully reflected in the lodestar. *Id.* at 567-68, 106 S. Ct. at 3099. And "[i]n the absence of such evidence and such findings," the Court could "find no reason to increase the fee award" based on the quality of representation. *Id.* at 568, 106 S. Ct. at 3099-3100.

There are two ways to interpret the *Delaware Valley* decision and its "furthermore" discussion. One way is to read the decision as containing two alternative holdings: an enhancement for superior representation and exceptional results is never permitted; and, even if it were, there was insufficient evidence or findings of anything special in that case. *See Kenny A.*, 532 F.3d at 1239-41 (Carnes, J., concurring). The other way is to read *Delaware Valley* as containing not two alternative holdings but only one, which is that such enhancements are not allowed absent specific evidence and findings to support the conclusion that the quality of representation and results obtained were truly special. *See Kenny A.*, 532 F.3d at 1243-45 (Wilson, J., concurring); *Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Cir. 2004). Under that view,

everything before the "furthermore" in the *Delaware Valley* opinion is not an alternative holding but only dicta.

If my alternative holdings interpretation of *Delaware Valley* is correct, then the law of this circuit and of the Sixth Circuit is flatly contrary to Supreme Court precedent, which needs to be clarified so that it will no longer be misinterpreted as holding exactly the opposite of what it does. If, instead, the narrow interpretation of the *Delaware Valley* decision is correct, then the Supreme Court has yet to hold – not imply, intimate, or suggest in dicta but actually hold – whether the federal fee-shifting statutes allow an enhancement when there is specific evidence and findings of superior performance and unexpected results.

The issue is clearly and squarely presented in this case. Two of the panel members in this case sharply disagreed and wrote about the meaning and effect of the *Blum* and *Delaware Valley* decisions, both of which reversed instead of affirmed enhancements for superior performance and results. Those two panel members also disagreed about the effect on this issue of the reasoning in *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638 (1992), which is the Court's last decision on the subject of lodestar enhancements. *Compare Kenny A.*, 532 F.3d at 1221-33, 1239-41 (Carnes, J., concurring) *with id.* at 1242-49 (Wilson, J., concurring). The third panel member kept his views about that matter to himself. *See id.* at 1251 (Hill, J., concurring). The bottom line for certiorari

review purposes, however, is that the law of the Eleventh Circuit permits this kind of enhancement, and that law was applied to permit a $4.5 million enhancement of the lodestar amount in this case. *See id.* at 1236-39, 1242 (Carnes, J., concurring); *id.* at 1242, 1251 (Wilson, J., concurring); *id.* at 1251 (Hill, J., concurring).

The decision whether to affirm or vacate the $4.5 million enhancement part of the attorney's fee award turns on whether an enhancement for superior performance and exceptional results is permissible. If boosting the fee award on that basis is not proper, the judgment of the district court will have to be vacated and the case remanded. On remand the enhancement will have to be set aside entirely or at least substantially reduced because without that basis the $4.5 million increase above the lodestar amount of reasonable fees cannot stand.

This case presents the superior performance and exceptional results enhancement issue as well as any ever will because the evidence and findings in this case are as specific as any are likely to be. It is true that the evidence that the attorneys put into the record in this case was in the form of affidavits from friendly lawyers with a vested interest in boosting the award, and for that and other reasons I did not find it particularly convincing. *See id.* at 1231-33 (Carnes, J., concurring). But the district court and at least one panel member did. *See id.*, 532 F.3d at 1247-49 (Wilson, J., concurring); *see Kenny A.*, 454 F. Supp. 2d at 1290. More importantly for present purposes, the

evidence in this case goes beyond that in the *Blum* and *Delaware Valley* cases, and given the nature of the question it is hard to imagine any more specific supporting evidence than is in the record here.

And the supporting findings by the district court were probably as specific as any could be, to say nothing of the enthusiasm with which they were uttered. *See Kenny A.*, 454 F. Supp. 2d at 1288-90. The district court unequivocally proclaimed that the attorneys being awarded fees "brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289. To convey its feelings about the result obtained, the court reached back beyond its 27 years on the bench, stating that "[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

In fact, the district court speculated, the results the attorneys were able to achieve through settlement probably exceeded what their clients were entitled to receive under the law. *Id.* at 1289-90 ("[E]ven if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree."); *see also Kenny A.*, 532 F.3d at 1229-30 (Carnes, J., concurring) (explaining that "[t]o the extent that the district court rewarded plaintiffs' counsel with an enhancement for

obtaining better results than the class would have received had the case been resolved on the merits, that is plainly wrong," because "the fee-shifting statutes are not designed to provide representation that will win plaintiffs more than a correct application of substantive and remedial law entitles them to receive"). The district court's statement highlights the exceptional results issue.[3]

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[3] The issue is also highlighted by the fact that the district court calculated the lodestar using the full hourly rates the plaintiffs requested, ranging from $75 to $150 for paralegals, interns, and assistants up to from $215 to $495 for the attorneys depending on "skill, judgment, and performance." *See Kenny A.*, 454 F. Supp. 2d at 1284-85; *see also Kenny A.*, 532 F.3d at 1217 (majority opinion). "[T]hose hourly rates . . . appear to be on the generous side," *id.* at 1220 n.2., but the district court did not cut them by so much as a penny.

In approving in full the hourly rates that the plaintiffs requested, the district court expressly relied on "the stellar performance of plaintiffs' counsel throughout this long and difficult case," *Kenny A.*, 454 F. Supp. 2d at 1286. That admission perfectly frames the question of whether the Supreme Court meant what it said in *Delaware Valley* about "the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation [being] presumably fully reflected in the lodestar amount, and thus [those factors] cannot serve as independent bases for increasing the basic fee award." *Delaware Valley*, 478 U.S. at 565, 106 S. Ct. at 3098 (quotation marks omitted, brackets omitted and added). The district court plainly counted "the stellar performance of plaintiffs' counsel" twice – once in setting the high hourly rates and again in enhancing the lodestar after using those hourly rates to calculate it. *Kenny A.*, 454 F. Supp. 2d at 1286, 1288-89.

It may be that the evidence and findings in this case are insufficient to support a superior performance and exceptional results enhancement. If so, it likely will be because no evidence or findings can ever justify an enhancement on performance and results grounds because the lodestar already takes into account all of the factors that go into how well an attorney performs and the result obtained. The decisions in *Dague* and *Delaware Valley* imply as much. *See Dague,* 505 U.S. at 562-63, 112 S. Ct. at 2641-42; *Delaware Valley,* 478 U.S. at 565-66, 106 S. Ct. at 3098-99. If that is the law, the Supreme Court needs to tell those of us on the lower courts because that point has not gotten across. *See, e.g., Kenny A.,* 532 F.3d at 1243-45 (Wilson, J., concurring); *Geier,* 372 F.3d at 794-95; *see also Norman,* 836 F.2d at 1302; *NAACP,* 812 F.2d at 1336-37. *See generally Kenny A.,* 532 F.3d at 1239 n.29 (Carnes, J., concurring).

The importance of the lodestar question presented by this case extends beyond the particular statute involved in this case. It arises not only under 42 U.S.C. § 1988, as significant as that statute is, but also under every other federal fee-shifting statute that allows the prevailing party to recover a reasonable attorney's fee. While these statutes "cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" *Delaware Valley,* 478 U.S. at 562, 106 S. Ct. at 3096-97. And "case law construing what is a 'reasonable'

fee applies uniformly to all of [the federal fee-shifting statutes]." *Dague*, 505 U.S. at 562, 112 S. Ct. at 2641; *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2, 109 S. Ct. 2732, 2735 n.2 (1989) ("[F]ee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike." (citation omitted)); *Blum*, 465 U.S. at 893, 104 S. Ct. at 1546 (noting that "Congress directed that attorney's fees [under § 1988] be calculated according to standards currently in use under other fee-shifting statutes"); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691, 103 S. Ct. 3274, 3281 (1983) (explaining "that similar attorney's fee provisions should be interpreted *pari passu*"); *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428, 93 S. Ct. 2201, 2202 (1973) (noting that "[t]he similarity of language" in two fee-shifting statutes "is, of course, a strong indication that the two statutes should be interpreted pari passu").

At a minimum, there are "over 100 separate [federal] statutes providing for the award of attorney's fees." *Delaware Valley*, 478 U.S. at 562, 106 S. Ct. at 3096. The actual number may be higher. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1588 (1993) (noting that "[t]here are over 200 federal statutes . . . that provide for shifting of attorney's fees"); Marjorie A. Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C. L. Rev. 379, 386 n.47 (1989)

(estimating that "Congress has enacted anywhere from 100 to 200 fee-shifting statutes" (internal citations omitted)). A partial list of federal fee-shifting statutes is attached as an appendix to this opinion. The precise number of federal "reasonable attorney's fee" statutes is not the point. The point is that this issue arises under not just one federal statute but under at least a hundred of them.

An unresolved issue affecting so many federal statutes is important. The record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can. It presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?

APPENDIX

Partial List of Federal Statutes Providing for the Prevailing Party To Recover a Reasonable Attorney's Fee

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E);

Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B) & (g)(4)(B);

Government in the Sunshine Act, 5 U.S.C. § 552b(i);

Commodity Exchange Act, 7 U.S.C. § 18(d)(1) & (e);

Packers and Stockyards Act, 7 U.S.C. § 210(f);

Perishable Agricultural Commodities Act 1930, 7 U.S.C. § 499g(b);

Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a) & (c);

Plant Variety Protection Act, 7 U.S.C. § 2565;

Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 303(i)(1)(B) & 523(d);

Home Owners' Loan Act, 12 U.S.C. § 1464(q)(3);

Federal Credit Union Act, 12 U.S.C. § 1786(p);

Federal Deposit Insurance Act, 12 U.S.C. § 1818(n);

Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975;

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(5);

Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3417(a)(4) & 3418;

Clayton Act, 15 U.S.C. § 15(a) & (b)(1);

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c(a)(2) & 26;

Securities Act of 1933, 15 U.S.C. § 77k(e);

Trust Indenture Act of 1939, 15 U.S.C. §§ 77ooo(e) & 77www(a);

Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a), 78u(h)(8);

Jewelers' Liability Act, 15 U.S.C. § 298(b)-(d);

Consumer Leasing Act, 15 U.S.C. § 1667b(a);

Consumer Credit Protection Act, 15 U.S.C. §§ 1691e(d) & 1692k(a)(3);

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1709(c);

Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073(a);

Hobby Protection Act, 15 U.S.C. § 2102;

Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d)(2);

Toxic Substances Control Act, 15 U.S.C. §§ 2618(d) & 2619(c)(2);

Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1)(c) & (3);

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. §§ 3608(d) & 3611(d);

Export Trading Company Act of 1982, 15 U.S.C. § 4016(b)(1) & (4);

National Cooperative Research Act of 1984, 15 U.S.C. § 4304(a)(1) & (b);

National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4;

Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4);

Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1);

Copyright Act of 1976, 17 U.S.C. § 505;

Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 911(f);

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c);

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520(b)(3);

Navajo and Hopi Indian Relocation Amendments Act of 1980, 25 U.S.C. § 640d-27(b);

Tax Reform Act of 1976, 26 U.S.C. § 6110(j)(2)(B);

Jury System Improvement Act of 1978, 28 U.S.C. § 1875(d)(2);

Judicial Code, 28 U.S.C. § 1927; 28 U.S.C. § 2412(b);

Equal Access to Justice Act, 5 U.S.C. § 504(a)-(b);

Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b);

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431(c);

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b);

Rehabilitation Act of 1973, 29 U.S.C. § 794a(b);

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g);

Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1451(e);

Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(3) & 938(c);

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1275(e) & 1293(c);

Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c);

Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4);

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Clean Water Act, 33 U.S.C. § 1365(d);

Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4);

Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d);

Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d);

Patent Infringement Act, 35 U.S.C. § 285;

Safe Drinking Water Act, 42 U.S.C. § 300j-8(d);

Social Security Act, 42 U.S.C. § 406(b);

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b);

Voting Rights Act of 1965, 42 U.S.C. § 1973l(e);

Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997a(b) & 1997c(d);

Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b);

Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-1;

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k);

Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-6(f);

Atomic Energy Act of 1954, 42 U.S.C. § 2184;

Fair Housing Act of 1968, 42 U.S.C. § 3612(p);

Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(a) & (c);

Noise Control Act of 1972, 42 U.S.C. § 4911(d);

National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5412(b);

Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2);

Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1);

Energy Policy and Conservation Act, 42 U.S.C. § 6305(d);

Solid Waste Disposal Act, 42 U.S.C. § 6972(e);

Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f);

Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(e)(2);

Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d);

Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d);

Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5) & (b)(2);

Railway Labor Act of 1926, 45 U.S.C. § 153(p);

Communications Act of 1934, 47 U.S.C. §§ 206 & 407;

Cable Communications Policy Act of 1984, 47 U.S.C. § 553(c)(2)(C);

Interstate Commerce Act, 49 U.S.C. §§ 11704(d)(3), 11707(b);

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1810(c).

OPPOSITION BRIEF

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(2)

No. 08-970

Supreme Court, U.S.
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In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in awarding an upward adjustment of the initial lodestar fee, based upon specific record findings of superior performance and exceptional success?

2. Is an upward adjustment of the initial lodestar due to superior performance and exceptional success categorically precluded when a district court reduces the initial lodestar for duplicative or excessive hours billed?

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STATEMENT OF THE CASE

The District Court in this case properly applied settled law and exercised its discretion in arriving at a reasonable fee under 42 U.S.C. § 1988, by adjusting the initial lodestar calculation upward, based on specific record evidence and findings of superior performance and extraordinary results. A full statement of the facts is necessary because the Petition does not provide the Court with either a complete or fair picture of the proceedings below.[1]

I. Litigation

Plaintiffs, abused and neglected foster children in the custody of the Georgia Department of Human Resources, filed a class action complaint on June 6, 2002, in the Superior Court of Fulton County, Georgia, on

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[1] For the Court's convenience, the District Court and Court of Appeals decisions in this case are cited herein as follows: *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (denying motions to dismiss and granting class certification) is cited as *Kenny A. I*; *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-cv-1686-MHS, 2004 WL 5503780 (N.D. Ga. Dec. 13, 2004) (denying motion for summary judgment and motion to exclude expert reports and testimony) is cited as *Kenny A. II*; *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (denying counties' motions for summary judgment) is cited as *Kenny A. III*; *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260 (N.D. Ga. 2006) (awarding fees and expenses) is cited as *Kenny A. IV*; *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209 (11th Cir. 2008) (affirming fees award), is cited as *Kenny A. V*; and *Kenny A. ex rel. Winn v. Perdue*, 547 F.3d 1319 (11th Cir. 2008) (denying rehearing en banc) is cited as *Kenny A. VI*.

behalf of themselves and a putative class of all 3,000 foster children in Fulton and DeKalb Counties, which comprise metropolitan Atlanta. Plaintiffs asserted state law claims and claims under federal law pursuant to 42 U.S.C. § 1983 against state officials, alleging system-wide failures in the foster care system that harmed foster children in state custody.[2]

The facts concerning the "enormous time and effort involved in litigating this complex matter" have been fully set forth by the District Court. *See Kenny A. IV*, 454 F. Supp. 2d 1260, 1266-70 (N.D. Ga. 2006). Class counsel devoted in excess of 30,000 hours of labor over a five-year period on behalf of the class. *Id.* at 1273. Reflecting the breadth of the facts, legal issues, and contentious nature of this litigation, the District Court observed that it was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench." *Id.* at 1266.

After Defendants removed the case to federal court, Plaintiffs successfully obtained class certification and defeated Defendants' motions to dismiss. *Kenny A. I*, 218 F.R.D. 277, 305 (N.D. Ga. 2003). Early in the case, Plaintiffs also sought expedited discovery and moved for a preliminary injunction,

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[2] Separate claims were brought against and settled with Fulton and DeKalb County officials for the failure to provide children with adequate, effective, and zealous legal representation in the Juvenile Courts.

which required a four-day evidentiary hearing and the presentation of numerous fact and expert witnesses. *Kenny A. IV*, 454 F. Supp. 2d at 1267. Plaintiffs demonstrated "major deficiencies" that led to the closure of two dangerous emergency shelters in Atlanta. *Id.* at 1267-68.

The work required to gather the facts and to assess the performance of Georgia's child welfare system was labor-intensive and extremely time-consuming. Disputes over discovery were frequent, with Defendants "seeking repeatedly to limit plaintiffs' discovery efforts." *Id.* at 1266. The District Court recounted the obstacles Plaintiffs faced during discovery, observing that Defendants' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.* In all, class counsel reviewed and analyzed nearly half a million pages of documents and more than sixty witnesses were deposed. *Id.* at 1276-77.

After the parties exchanged extensive expert reports and completed expert discovery, Defendants filed a voluminous motion for summary judgment at the close of discovery, followed by a *Daubert* motion to exclude the reports and testimony of all of Plaintiffs' experts. Plaintiffs defeated both motions.[3]

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[3] *See Kenny A. II*, 2004 WL 5503780, at *13; *see also Kenny A. IV*, 454 F. Supp. 2d at 1266-69 (Defendants' motion "was supported by a 74-page memorandum and a 126-page Statement

(Continued on following page)

II. Consent Decree

With a February 2005 trial date approaching, the District Court appointed a mediator and directed the parties to explore possibilities of settlement. *Id.* at 1269. The parties embarked on settlement negotiations that lasted over six months. On July 5, 2005, the parties presented the District Court with a proposed Consent Decree granting sweeping relief to the thousands of children in the Plaintiff Class. *Id.* at 1269, 1289-90. After directing notice to the Class, conducting the requisite fairness hearing, and considering all comments received from all interested parties, the District Court granted final approval to the class-wide settlement and, on October 27, 2005, entered the Consent Decree as an order of the District Court. *Id.* at 1269.

The result achieved for the Plaintiff Class and reflected in the Consent Decree is, as the District Court described it, "truly exceptional":

> The Consent Decree provides sweeping relief to the plaintiff class, the scope of which can only be fully appreciated by summarizing its provisions. Its centerpiece is a series of thirty-one outcome measures that State Defendants have agreed to meet and sustain for

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of Undisputed Material Facts consisting of 612 separately numbered paragraphs, as well as a 48-page Statement of Legislative Facts consisting of 74 separately numbered paragraphs" along with six affidavits and three volumes of appendices.)

at least three consecutive six-month reporting periods.

The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect; regular visits of foster children by case workers; approval and licensure of foster homes and other placements; the percentage of children who are victims of substantiated maltreatment while in foster care; the percentage of children in foster homes that exceed their licensed capacity; the percentage of children who have experienced multiple moves while in foster care; and periodic judicial reviews of the safety and status of foster children.

In addition, the Consent Decree requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children.

Moreover, State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single

> statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a "needs assessment" to be conducted by a neutral expert. The settlement also includes processes for the supervision of private contract agencies that provide homes and services for foster children; improvements in foster parent screening, licensing and training, as well as foster parent support and communication; improvements in case manager training; improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in foster care; and improvements in efforts to maximize available federal funding.
>
> . . . .
>
> As the foregoing summary amply demonstrates, the settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage. . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.

Kenny A. IV, 454 F. Supp. 2d at 1289-90.

III. Attorney's Fees

The parties did not reach agreement on fee and expense recovery. Thus, on that subject, the parties agreed that Plaintiffs were "prevailing parties" under 42 U.S.C. § 1988 and specified in the Consent Decree

a process by which the amount of recovery would be determined. The parties tried but were unable to resolve the amount of fees, and on December 9, 2005, Plaintiffs filed a motion for an award of reasonable attorney's fees and expenses, including evidentiary support, which Defendants opposed.

The District Court employed a two-step analysis in arriving at a reasonable fee under 42 U.S.C. § 1988, by "first determining the number of hours reasonably expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated," and second "consider[ing] whether any adjustment to the lodestar is appropriate in this case." *See Kenny A. IV*, 454 F. Supp. 2d at 1272-73 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983)). In calculating the total hours reasonably expended, the District Court determined that some reductions were necessary for duplicative or excessive billing entries, and made an across-the-board cut of fifteen percent off of Plaintiffs' proposed billable hours for all non-travel-related fees. *Id.* at 1273-84.

In calculating reasonable hourly rates, the District Court found that Defendants had offered "no evidence to rebut the *prima facie* proof of prevailing market rates submitted in connection with plaintiffs' fee application." *Id.* at 1285. The District Court concluded that the rates presented by Plaintiffs were "fair and reasonable," stressing that, "[i]f anything,

they are too low." *Id.* at 1285-86.[4] Multiplying the reasonable hours by the reasonable rates, the initial lodestar calculation of fees determined by the District Court was $6,012,802.90. *Id.* at 1286. The District Court noted that the Plaintiffs' total lodestar fee was, in fact, less than the $6.1 million in Defendants' own legal expenses. *Id.* at 1286, 1288 n.7.

The District Court then addressed Plaintiffs' request for an upward adjustment of the lodestar. It reviewed specific evidence submitted by Plaintiffs, including approximately 2,500 pages of time and expense records, the declarations of Plaintiffs' counsel, and the declarations of four disinterested, "respected members of the Atlanta Bar." *Id.* at 1285, 1288-90. Among the four disinterested attorneys, each opined that the fees and expenses Plaintiffs sought were reasonable and, based on prevailing market rates of compensation for comparable work and results, that an award limited to the lodestar would be unreasonable and would *under-compensate* Plaintiffs' counsel. *Id.* Three of these attorneys testified that an upward adjustment of one-and-a-half to two times the lodestar was necessary to yield a reasonable fee consistent with the prevailing prices in the Atlanta legal market for legal services of comparable value. *Id.* A fourth went further, recommending a multiplier of up to five times the lodestar. *Id.*

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[4] The District Court compensated travel time at half the reasonable hourly rates. *See Kenny A. IV*, 454 F. Supp. 2d at 1284.

Defendants did not submit any rebuttal evidence on this issue. *See id.* at 1288-90.

Based upon its review of the evidence, the record in the case, its first-hand observation of the proceedings, and its own expertise, the District Court concluded that an upward adjustment was necessary to arrive at a reasonable fee. *Id.* at 1290. The District Court found, based on specific evidence, "that the superb quality of [Plaintiffs'] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. The District Court also found that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289. After making the additional finding that "the evidence established that plaintiffs' success in this case was truly exceptional," the District Court concluded that a 1.75 upward adjustment to the initial lodestar was the "minimum . . . necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 1290. Multiplying the lodestar by the 1.75 upward adjustment, the District Court's fee award totaled $10,522,405.08. *Id.*

Defendants appealed the District Court's decision on fees, and a panel of the Eleventh Circuit unanimously affirmed. *Kenny A. V*, 532 F.3d 1209, 1242 (11th Cir. 2008). The Eleventh Circuit panel found no abuse of discretion in the District Court's determination of

the hours or the hourly rates used to calculate the lodestar, and no abuse of discretion in the District Court's decision to apply an upward adjustment to arrive at a reasonable fee. *Id.*[5]

Defendants sought rehearing en banc, which was denied. *Kenny A. VI*, 547 F.3d 1319, 1320 (11th Cir. 2008). In a concurring opinion, Judge Wilson found that "[s]everal decades of established precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute, in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Id.* at 1320 (Wilson, J., concurring in denial of rehearing en banc) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air* (*Delaware Valley I*), 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984)). Ultimately concluding that "*Kenny A.* is that case," Judge Wilson also emphasized that "[b]efore arriving at its decision in this case, the district judge set forth detailed findings to explain why the lodestar

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[5] Judge Carnes, the author of the panel's majority opinion on affirmance, also wrote separately on his own behalf to make clear that his affirmance was based solely on binding Circuit precedent on the issue of the upward adjustment awarded by the District Court. *See Kenny A. V*, 532 F.3d at 1220-42 (Carnes, J., concurring) (Part VI). Judge Wilson authored a separate opinion, specially concurring in the majority's result only. *Id.* at 1242-51 (Wilson, J., concurring). Judge Hill also authored a separate opinion, concurring in the result only. *Id.* at 1251 (Hill, J., concurring).

figure did not fully reflect the quality of representation and the results achieved." *Id.* at 1321.[6]

REASONS FOR DENYING CERTIORARI

This Court has long recognized that the purpose behind the recovery of a reasonable attorney's fee under 42 U.S.C. § 1988 is to ensure "effective access to the judicial process" for those alleging violations of their civil rights.[7] On three separate occasions, this Court has made clear that an upward adjustment may be appropriate in rare cases of superior performance or exceptional results in order to provide a reasonable fee and that district court judges are in the best position to assess whether such adjustments are appropriate in particular cases.[8]

Petitioners' principal argument in support of certiorari is that the law in this area is unresolved. To

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[6] Judge Tjoflat authored a dissenting opinion, *Kenny A. VI*, 547 F.3d at 1322-31 (Tjoflat, J., dissenting), as did Judge Carnes, who was joined by Judges Tjoflat and Dubina, *id.* at 1331-39 (Carnes, J., dissenting).

[7] *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 94-1558, at 1 (1976), S. Rep. No. 04-1011, at 4 (1976)) (additional citations omitted). Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in civil rights cases. 42 U.S.C. § 1988.

[8] *Hensley*, 461 U.S. at 435-37; *Blum*, 465 U.S. at 888; *Delaware Valley I*, 478 U.S. at 565.

the contrary, the legal rules governing upward adjustments have been well settled and well understood for many years. It is not surprising, therefore, that Petitioners have been unable to identify any conflict among the circuits, or that the cases they cite instead are easily distinguishable.

This is a case about the facts, not the law. Upward fee adjustments are exceedingly uncommon. They occur in reported decisions on average less than once each year in the entire federal court system. The decision below represents nothing more than a fact-specific judgment based on a unique record that was thoroughly documented by the District Court in a 94-page order. In granting an upward adjustment, the District Court carefully considered the factors that this Court has articulated in its prior decisions. Petitioners clearly disagree with the application of that legal framework to these facts, but that disagreement does not warrant plenary review by this Court.

A. Settled Law Permits Upward Adjustments to an Initial Lodestar Calculation Based on Superior Performance and Extraordinary Results in the Rare and Exceptional Case.

In a line of cases beginning nearly a quarter-century ago, this Court set forth a clear set of rules to guide lower courts in considering whether to grant an upward adjustment to the initial lodestar in awarding attorney's fees. On the one hand, the Court has

rejected calls for a categorical rule barring such adjustments in all cases. On the other hand, the Court has made clear that such adjustments should be rare, and only when justified by superior performance and extraordinary results that are not reflected in the lodestar itself. That is precisely the determination that the district court made in this case.

In *Hensley v. Eckerhart,* this Court first addressed the issue of "the proper relationship of the results obtained to an award of attorney's fees." 461 U.S. 424, 432 (1983). The Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988," *id.* at 440, and "indeed in some cases of exceptional success an enhanced award may be justified," *id.* at 435. It also laid out the two-step procedure now routinely employed by the federal courts to calculate an attorney-fee award: (1) calculation of the lodestar, and (2) consideration of a downward adjustment or upward adjustment in rare and exceptional cases. *Id.* at 433-34, 440.[9] With respect to the hours portion of the "initial" lodestar calculation

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[9] While "the most critical factor is the degree of success obtained," in determining whether to make an upward or downward adjustment to the lodestar "[t]he district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9, 436.

under the first *Hensley* step, the Court stated that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly," and "[t]he district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Id.* at 433-34.

In concluding that a second step is required in arriving at a reasonable fee, regardless of whether any reductions in hours occur at the first stage of the lodestar calculation, the Court in *Hensley* implicitly rejected any categorical preclusion of an upward adjustment in cases where the hours were initially reduced as excessive, duplicative, or not reasonably expended on the litigation.

Hensley was followed one year later by *Blum v. Stenson,* which addressed "whether, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988." 465 U.S. 886, 889 (1984). On the first question, the Court unanimously held that district courts have the authority to award upward adjustments, even though the lodestar is calculated based upon prevailing market rates. *Id.* at 897, 901. On the second question, the Court held that superior quality of representation and exceptional results obtained could, in a rare case, justify an enhancement. *Id.* at 901. The Court stated:

> The "quality of representation," however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to

> show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

Blum, 465 U.S. at 899 (citing *Hensley*, 461 U.S. at 434-35); *see also id.* at 897 n.14 (noting *Hensley*'s observation that "other considerations . . . may lead the District Court to adjust the fee upward or downward, including the important factor of the 'results obtained' ").[10]

By recognizing that proof of superior performance and exceptional success may justify an upward adjustment to the lodestar, *Blum* directly contradicts Petitioners' central argument in support of certiorari review.

The third Supreme Court case to consider upward adjustments in depth reaffirmed *Blum*. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, the Court noted, again, that factors such as "the special skill and experience of counsel," the "quality of representation," and the "results obtained" are "presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award" in the usual case,

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[10] The attorneys in *Blum* "offered no such evidence," and therefore were not entitled to an enhancement. 465 U.S. at 899. In this case, as the District Court found and the Court of Appeals affirmed, class counsel "identified record evidence that shows that the benefit achieved requires an upward adjustment to the fee." *Id.* at 900.

however "upward adjustments of the lodestar figure are still permissible" and are proper "in certain 'rare' and 'exceptional' cases." 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-901).[11]

Moreover, in *Delaware Valley I*, the Court again implicitly rejected any *per se* rule precluding an upward adjustment when reductions are made in the hours billed as part of the initial lodestar calculation. Applying the *Hensley* framework, the lower court in *Delaware Valley I* eliminated a large number of hours submitted by prevailing plaintiffs for lack of detail, duplicative work, unrelated activities, and excessive time, but ultimately awarded an upward adjustment to a portion of plaintiffs' fee submission on the basis of superior quality of representation. 478 U.S. at 554-55. While the Court ultimately rejected the upward adjustment in that case, the reduction in hours in the

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[11] In *Pierce v. Underwood*, the concurring opinion of three justices reiterated the twin holdings in *Blum* that a lodestar is "presumably" a reasonable fee but that "an upward adjustment may be appropriate 'in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional.' " 487 U.S. 552, 582 (1988) (Brennan, J., concurring) (quoting *Blum*, 465 U.S. at 899). In *Blanchard v. Bergeron*, which addressed whether a contingent-fee arrangement could place a ceiling on attorney's fees recoverable under 42 U.S.C. § 1988, the Court again affirmed that, after multiplying the number of hours reasonably expended by a reasonable hourly rate, "courts may then adjust this lodestar calculation by other factors," specifying that "[t]he *Johnson* factors may be relevant in adjusting the lodestar amount." 489 U.S. 87, 94 (1989).

initial lodestar calculation was not dispositive. Instead, the Court engaged in a comprehensive analysis as to whether an adjustment was justified and based its holding on the fact that the district court made no specific findings on quality of lawyering or results. *Id.* at 568. It was only "[i]n the absence of such evidence and such findings" that the Court "[found] no reason to increase the fee award . . . for the quality of representation." *Id.* It would have been unnecessary to consider the propriety of the district court's upward adjustment if the prior reduction of the lodestar automatically foreclosed an upward adjustment. By considering whether adjustment was proper after a reduction of the lodestar, the Court implicitly rejected the categorical rule advanced by Petitioners.[12]

The Court's most recent statement on the lodestar analysis and adjustments was in *City of Burlington v. Dague*, which addressed whether the lodestar in a statutory fee-shifting case may be adjusted upward to account for contingency and the risk of nonpayment. 505 U.S. 557, 559 (1992). While the Court

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[12] Consistent with *Hensley*, *Blum*, and *Delaware Valley I*, other courts have reduced hours in the initial lodestar calculation for duplicative billing, but granted an upward adjustment to establish a reasonable fee. *See Hollowell v. Gravett*, 723 F. Supp. 107, 109-10 (E.D. Ark. 1989) (awarding an upward adjustment of 1.75 after reducing a portion of the hours in the initial lodestar calculation); *Hartman v. Duffey*, 973 F. Supp. 199, 200-02 (D.D.C. 1997) (awarding an upward adjustment of 1.25 after reducing a portion of hours in the initial lodestar calculation).

held that an upward adjustment for contingency was impermissible, it reaffirmed that upward adjustment of a lodestar may be granted on other grounds to the fee applicant who shows that "'such an adjustment is *necessary* to the determination of a reasonable fee.'" *Id.* at 562 (quoting *Blum*, 465 U.S. at 898) (emphasis in *Dague*).

Thus, *Hensley*, *Blum*, *Delaware Valley I*, and *Dague* provide clear guidance to the lower courts in determining whether to apply an upward or downward adjustment to the initial lodestar. As Judge Wilson noted, "[s]everal decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with . . . [§ 1988], in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Kenny A. VI*, 547 F.3d at 1320 (Wilson, J., concurring in denial of rehearing en banc).

Petitioners implicitly acknowledge the clarity of the Supreme Court's attorney-fee jurisprudence by admitting that an "upward adjustment based upon superior performance and results obtained should not *usually* be awarded, because these factors are *normally* subsumed within the lodestar. . . ." (Pet. Cert. 15 (emphasis added).) Petitioners correctly observe that, in most cases, the lodestar calculation is reasonable and not subject to adjustment because the performance of counsel and results obtained are "generally . . . reflected in the reasonable hourly rate" and the amount of time expended. *Blum*, 465 U.S. at

899. But, the presumption of reasonableness is just that – a presumption – subject to rebuttal by specific evidence of superior performance and exceptional success.

B. There Is No Circuit Split or Confusion Among the Lower Courts.

There is no split among the federal appellate courts on the question of whether *Hensley, Blum, Delaware Valley I*, and *Dague* generally authorize a district court to upwardly adjust the lodestar.[13] Moreover, "[t]he

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[13] *E.g.*, *Adams v. Zimmerman*, 73 F.3d 1164, 1178 (1st Cir. 1996) (recognizing upward adjustment based on results obtained as "a 'tiny' exception to the lodestar rule") (citation omitted); *Green v. Torres*, 361 F.3d 96, 99 (2d Cir. 2004) ("[I]n some cases of exceptional success an enhanced award may be justified.") (internal quotation marks and citation omitted); *Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 677 (3d Cir. 2002) (recognizing that upward adjustment for superior representation may be justified in "very rare circumstances where the attorney's work is so superior and outstanding that it far exceeds the expectations of clients and normal levels of competence") (internal quotation marks and citation omitted); *Johannssen v. Dist. No. 1-Pac. Coast Dist., MEBA Pension Plan*, 292 F.3d 159, 181 (4th Cir. 2002) ("Grants of an enhancement are both discretionary and rare, and the applicant bears the burden of proof of an exceptional result.") (citations omitted); *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 661 (5th Cir. 2002) (stating that lodestar may be adjusted upward or downward based on factors that lodestar calculation did not take into account); *Geier v. Sundquist*, 372 F.3d 784, 793-96 (6th Cir. 2004) ("The Supreme Court has emphasized that, although application of the *Johnson* factors is limited . . . the use of the 'results obtained' and the 'quality of representation' for an upward adjustment analysis [is permissible in] 'rare' and 'exceptional' cases."); *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993) ("[F]ee enhancements may

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Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits – all of the circuits that have considered this issue – agree that a district court may provide an enhancement for exceptional performance." *Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (citing cases).

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be available for quality of representation, but only in the 'rare' case where the counsel offers specific evidence that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'") (internal quotation marks and citation omitted); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir. 1999) ("An upward adjustment to an attorney's lodestar hourly rate is permissible in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts.") (internal quotation marks and citations omitted); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (stating that upward adjustment for quality of representation "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and the success was exceptional"); *Roe v. Cheyenne Mtn. Conf. Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) ("The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional."); *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]f the results obtained are exceptional . . . no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed.") (citations omitted); *In re Donovan*, 877 F.2d 982, 991-92 (D.C. Cir. 1989) (noting that "an upward adjustment to the normal award may be justified in an exceptional case.").

The court of appeals decisions invoked by Petitioners suggest neither disagreement nor confusion among the circuits, and instead help demonstrate the settled law on upward adjustments. The Ninth and Seventh Circuits' decisions in *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 & n.6 (9th Cir. 1987), and *In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601, 607 (7th Cir. 1987), each affirmed the denial of an upward adjustment and correctly emphasized that factors such as the quality of representation and results achieved are usually (but not always) reflected in the initial lodestar. The Seventh Circuit in *In re Burlington Northern* issued a subsequent order denying a rehearing, in which it stated: "[W]e wish to emphasize that our holding was a narrow one. We held only that, in light of recent Supreme Court precedent, the district court's failure to apply a multiplier to the appellants' fee award in order to compensate them for the risk of losing the case was not an abuse of discretion." 810 F.2d at 611.[14]

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[14] Petitioners also cite *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), which incorrectly limited the evaluation of an upward adjustment for superior performance to a "genius factor" which, the court held, results in efficiencies that diminish as hours expended increase. As noted in *Liberles v. Daniel*, a case cited by Petitioners that awarded an upward adjustment for superior performance and results, the *Ramos* decision is of limited guidance given the Court's subsequent decision in *Blum*, which did not proscribe any single set of facts that could support the rare upward adjustment for superior performance. 619 F. Supp. 1016, 1019 (N.D. Ill. 1985). If anything, Petitioners'

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Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany,[15] also cited by Petitioners, concerned the application of the "forum rule" in which hourly rates are determined for out-of-district attorneys for purposes of the initial rate-times-hours calculation. 522 F.3d 182, 190 (2d Cir. 2008). *Arbor Hill* addressed the determination of the "reasonable hourly rate" with regard to "what a reasonable, paying client would be willing to pay," *id.* at 184, after which "[t]he district court should then use that reasonable hourly rate to calculate what can properly be termed the 'presumptively reasonable fee,'" *id.* at 190. Of course, the *presumptively* reasonable fee leads to the second step in this Court's *Hensley* line of cases and the consideration of a downward or upward adjustment, which was not at issue in *Arbor Hill*.[16]

Petitioners' attempt to convey confusion among the district courts is similarly unavailing. The thousands of fee decisions subsequent to the Court's 1983 decision in *Hensley* overwhelmingly apply the settled

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reliance on a pre-*Blum* decision illustrates the challenge Petitioners have faced in locating relevant examples of purported confusion among the lower courts.

[15] The opinion cited herein superseded *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 484 F.3d 162 (2d Cir. 2007), the opinion cited by Petitioners.

[16] Petitioners do not dispute the reasonable hourly rates in the instant case, as determined by the District Court, based on the un-rebutted evidence submitted by Plaintiffs. *See Kenny A. IV*, 454 F. Supp. 2d at 1285-86.

Supreme Court standard, and upward adjustments remain truly rare. Respondents have identified 67 reported federal cases decided in the 17 years since the 1992 decision in *Dague* (other than *Kenny A. IV*) in which an upward adjustment to the lodestar based on the quality of representation, the results obtained, or both was requested by the prevailing party and ruled upon by the court. Of these, in only 9 cases did the fee applicants obtain an upward adjustment that was not overturned on appeal.[17] That amounts to less than one upward adjustment each year. Given the rarity of upward adjustments, Petitioners cannot credibly argue confusion among the district courts, or

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[17] *See, e.g., Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008) (affirming upward adjustment of 50% in case in which attorney recovered $14 million verdict for individual who spent 18 years on death row after being wrongfully convicted of murder); *Barnes v. City of Cincinnati*, 401 F.3d 729, 745-47 (6th Cir. 2005) (affirming upward adjustment of 75% in successful sex discrimination case); *Paschal v. Flagstar Bank FSB*, 297 F.3d 431, 436 (6th Cir. 2002) (affirming upward adjustment of 50% in race discrimination suit for superior performance); *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999) (award of 33% enhancement appropriate for exceptional success); *Chopra v. Gen. Elec. Co.*, 527 F. Supp. 2d 230, 252 (D. Conn. 2007) (20% enhancement for "startling" success at proving age discrimination at trial); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 334 (W.D. Tex. 2007) (68% upward adjustment awarded to counsel after successful race discrimination settlement for a total fee award of $11,720,000); *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1287-88 (D. Wyo. 2004) (25% enhancement awarded for successful challenge to prisoner safety); *Hartman*, 973 F. Supp. at 202 (25% enhancement); *United States v. Stern*, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993) (50% enhancement in case brought under False Claims Act), *vacated in part on other grounds*, 932 F. Supp. 277 (M.D. Fla. 1993).

that the courts are routinely awarding windfalls to prevailing parties in fee-shifting cases. (Pet. Cert. 11.)[18]

Moreover, Petitioners' argument that the attorney fee award at issue here has the effect of penalizing early settlement is without merit because it relies on a false distinction. (Pet. Cert. 20 n.5.) A reasonable attorney's fee would almost always be larger in a case that proceeded through a full trial than in a case that settled before trial, without regard to whether any adjustment to the initial lodestar was warranted. Thus, any issues of defense strategy are separate from whether a district court adjusts, or might adjust, an initial lodestar in a particular case.

Finally, Petitioners seek to distinguish the numerous "cases cited by Judge Wilson where circuit courts have interpreted [the Supreme Court's] decisions as permitting an enhancement to the lodestar based on quality of performance and results obtained,"[19] by referring to a number of district court decisions which Petitioners argue "have concluded otherwise." (Pet. Cert. 21.) Yet most of these decisions

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[18] Petitioners quote from the decision in *Miller v. Holzmann*, which in turn quotes from a pre *Hensley* 1982 court of appeals decision lamenting that "district courts' increasing predilection for 'adjust[ing] the lodestar upward to reflect what the courts [subjectively] view as a high . . . quality of representation,' . . . should stop." 575 F. Supp. 2d 2, 54 (D.D.C. 2008) (quoting *Donnell v. United States*, 682 F.2d 240, 254 (D.C. Cir. 1982) (brackets in original)).

[19] *See Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (reviewing cases).

applied the settled law under *Hensley-Blum-Delaware Valley I*, but reached varying results, as might be expected, based on the particular facts in those cases.[20] Two cases cited by Petitioners simply misstated the law in dicta.[21]

Petitioners' strained effort to show confusion is highlighted by their reference to *Americans United for Separation of Church & State v. School District of Grand Rapids*, which observed that "an otherwise reasonable fee" cannot be adjusted upward based on

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[20] *See Lorillard Tobacco Co. v. Engida*, No. 06-cv-00225-LTB, 2008 WL 2955917 (D. Colo. July 31, 2008); *Shakman v. City of Chicago*, No. 69-C-2145, 2008 WL 754124 (N.D. Ill. Mar. 18, 2008); *Campbell v. Kansas State Univ.*, 804 F. Supp. 1393 (D. Kan. 1992); *Cary v. Chicago Housing Authority*, No. 87-C-6998, 1992 WL 91799 (N.D. Ill. Apr. 29, 1992).

[21] In *Nintendo of America, Inc. v. NTDEC*, the district court noted in dicta that several factors, among them the quality of representation and results obtained, "have been held to be subsumed in the lodestar calculation." 822 F. Supp. 1462, 1467 (D. Ariz. 1993). Similarly, in *Bishop v. Osborn Transportation, Inc.*, 687 F. Supp. 1526, 1533 (N.D. Ala. 1988) the district court noted in dicta that several *Johnson* factors, including the amount involved and results obtained, and the experience, reputation, and ability of the attorneys, "are clearly subsumed" in the lodestar. 687 F. Supp. 1526, 1533. While both courts plainly misread the *Hensley* line of cases, their errors were harmless, as the fee applicants do not appear to have requested any upward adjustment and none was granted. *See Nintendo*, 822 F. Supp. at 1466 (summarizing fee request); *Bishop*, 687 F. Supp. at 1531 (noting deficiencies in fee request). It is inevitable that district courts will make errors of law in isolated cases. But, particularly where those errors are confined to dicta, they do not provide a compelling argument for certiorari.

the results obtained. 717 F. Supp. 488, 502 (W.D. Mich. 1989). (*See* Pet. Cert. 23.) Of course, a *reasonable fee* cannot be enhanced; rather, an upward adjustment is only appropriate where the fee as initially calculated by the lodestar would otherwise be *unreasonable*, as it was found to be in this case.

C. The District Court Did Not Abuse Its Discretion in Applying the Properly Stated Law in This Case.

With the law clearly settled, Petitioners are left with seeking certiorari review of the District Court's exercise of discretion under the facts of this case.[22] This basis for review is strongly disfavored. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). The Court has strongly affirmed the importance of the district court's discretion in the context of fee awards: "We reemphasize that the district court has discretion in determining the amount of a fee award.

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[22] A district court's determination of attorney's fees is reviewed for abuse of discretion but its predicate fact finding is reviewed for clear error. *See, e.g., Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008) ("We review the award of attorneys' fees for abuse of discretion, reviewing questions of law *de novo* and reviewing findings of fact for clear error.") (citation omitted); *Thompson*, 553 F.3d at 867 ("We review the district court's determination of reasonable hours and rate for clear error and its application of the *Johnson* factors for abuse of discretion.") (citation omitted).

This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 438.[23]

The District Court properly exercised its discretion in this case. Adhering to *Hensley*, *Blum*, and *Delaware Valley I*, the District Court properly stated and applied the two-step framework for calculating a reasonable attorney's fee. *See Kenny A. IV*, 454 F. Supp. 2d at 1272-73 ("In accordance with this methodology, the Court will calculate the lodestar by first determining the number of hours reasonably

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[23] *See also Blanchard*, 489 U.S. at 96 ("Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case."); *Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (observing that "[t]he discretion to enhance an attorney's fee is a tool uniquely within the province of the district judge. The district judge has an unparalleled opportunity to observe the attorney's performance in a given case. Only the district judge can evaluate the attorney's performance from the day he or she files the complaint to the day the judge enters the order."); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995) ("[T]he district court has a 'ringside view of the relevant conduct of the parties and of the underlying legal dispute,' and accordingly has ready access to the data that should inform a fee calculation.").

expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated. The Court will then consider whether any adjustment to the lodestar is appropriate in this case.").

After correctly setting forth the proper legal framework, the District Court proceeded to scrupulously apply it. First, the District Court scrutinized Respondents' billing judgment with respect to the hours they submitted, and "[a]fter carefully considering each of State Defendants' objections and conducting its own review of plaintiffs' counsel's time records," decided to exclude some of the hours in the fee petition. *Id.* at 1274. The District Court applied an across-the-board reduction of fifteen percent of the hours expended on non-travel-related fees. *Id.* at 1286.

The District Court then reviewed the rates requested by Respondents and the evidence submitted in support of those rates, and noted that Petitioners offered "no evidence to rebut the prima facie proof of prevailing market rates." *Id.* at 1285. The District Court concluded that "the requested hourly rates are fair and reasonable. . . . If anything, they are too low." *Id.* at 1285-86. These facts remain unchallenged in the Petition. Having identified the reasonable numbers for each of the lodestar factors, the District

Court calculated the plaintiffs' lodestar fee to be $6,012,802.90. *Id.* at 1287.[24]

Second, the District Court evaluated whether or not the lodestar yielded a reasonable fee award. The District Court once again correctly articulated and applied the proper legal standard:

> The calculation of the lodestar does not end the Court's inquiry. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434 (footnote omitted), *see also Blum*, 465 U.S. at 897 ("there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high"). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . , and indeed in some cases of exceptional success an

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[24] Presumably, to create the impression that the District Court's actions were contradictory, Petitioners assert that the District Court reduced the lodestar and then "immediately turned around and enhanced its own reasonable lodestar determination by a 1.75 multiplier." (Pet. Cert. 17.) Of course, the District Court subtracted some of the hours submitted to arrive at a reasonable number of hours, and then multiplied those hours by the reasonable rate to arrive at the initial lodestar, and only then engaged in the second stage of the analysis, which is the determination of whether the lodestar number was in fact reasonable.

> enhanced award may be justified." *Hensley*, 461 U.S. at 435.
>
> The Court recognizes that most of the factors relevant to calculating a reasonable fee award are already reflected in the lodestar amount .... Nevertheless, upward adjustments of the lodestar figure are still permissible "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *The Court finds that plaintiffs have submitted such specific evidence in this case.*

Kenny A. IV, 454 F. Supp. 2d at 1288 (some internal citations omitted) (emphasis added).

Based on specific evidence presented by Respondents, a review of the record and its own expertise, the District Court concluded that "the superb quality of [counsel's] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar," and that Respondents' success "was truly exceptional." *Id.* at 1288-90. The District Court found that the superior quality of representation and extraordinary results were not sufficiently reflected in the lodestar, and that "the lodestar should be adjusted upward by a multiplier of 1.75[.]" *Id.* at 1288-90.

The District Court concluded:

> In determining the appropriate multiplier, the Court has relied on the foregoing evidence supporting an enhancement of the lodestar, the Court's own experience and expertise in this area, and on the declarations of four disinterested Atlanta attorneys submitted by plaintiffs. . . . Considering all the evidence presented, the Court believes it has selected the minimum enhancement of the lodestar necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case.

Id. at 1290.

In sum, the District Court applied the proper legal standard and concluded that an upward adjustment to the lodestar was necessary to establish a reasonable fee award in this case. *Id.* In so doing, the District Court acted within the bounds of its discretion. *See infra* n.17 (citing cases awarding upward adjustments to an initial lodestar calculation to arrive at a reasonable fee).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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JOINT APPENDIX

131 8635 (3)

No. 08-970

FILED

JUN 22 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed January 29, 2009
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Action No. 1:02-CV-01686-MHS

KENNY A., *et al.*,

Plaintiffs,

v.

ROY BARNES/SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

Date	Dkt. No.	Proceeding
06/19/2002	1	Notice of Removal with Class Action Complaint
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06/20/2002	3	Plaintiffs' Motion to Expedite Discovery
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02/08/2006	517	State Defendants' Brief in Opposition to Plaintiffs' Motion for Interim Award of Attorneys' Fees and Expenses of Litigation [Dkt. No. 516]
02/09/2006	518	Plaintiffs' Notice of Supplemental Authority Regarding Their Application for Award of Attorneys' Fees and Expenses of Litigation [Dkt. No. 495]
02/23/2006	521	Plaintiffs' Reply Brief in Support of Their Motion for Interim Award of Attorneys' Fees and Expenses of Litigation [Dkt. No. 516]
10/03/2006	534	Order Granting Plaintiffs' Application for Award of Attorneys' Fees and Expenses of Litigation [Dkt. No. 495]; Granting State Defendants' Motion for Review of Taxation of Costs [Dkt. No. 512]; and Denying Plaintiffs' Motion for Interim Award of Attorneys' Fees and Expenses of Litigation [Dkt. No. 516]

10/03/2006	535	Clerk's Judgment Entered in Favor of Plaintiffs and Against State Defendants for Attorneys' Fees in the amount of $10,522,405.08 and nontaxable expenses in the amount of $739,958.67 (total award of $11,262,363.75) and for post-judgment interest at the legal rate from 10/27/2005 and costs (as modified) in the amount of $95,485.08
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10/16/2006	537	State Defendants' Notice of Appeal
10/17/2006	538	Transmission of Certified Copy of State Defendants' Notice of Appeal [Dkt. No. 537], Judgment, Order, and Docket Sheet to U.S. Court of Appeals for the Eleventh Circuit
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02/05/2007	557	Transmittal of Certified Copy of Record to U.S. Court of Appeals for the Eleventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-CV-15514-AA

KENNY A., *et al.*,

Appellees/Cross-Appellants,

v.

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Appellants/Cross-Appellees.

RELEVANT DOCKET ENTRIES

Date	Proceeding
10/20/2006	Docketing Notice
11/27/2006	Brief of Appellants Filed; Record Excerpts Filed
12/28/2006	Brief of Appellees/Cross-Appellants Filed
01/26/2007	Reply Brief of Appellants and Brief of Cross-Appellees Filed
02/09/2007	Reply Brief of Cross-Appellants Filed
04/25/2007	Oral Argument
07/03/2008	Panel Decision Issued and Judgment Entered

07/23/2008	Petition for Rehearing En Banc Filed
11/05/2008	Petition for Rehearing En Banc DENIED
11/25/2008	Motion to Stay Mandate Pending Certiorari Filed
12/09/2008	Motion to Stay Mandate GRANTED

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al.,	:	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS
Plaintiffs,	:	
v.	:	
SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al.,	:	
Defendants.	:	

DECLARATION OF MARCIA ROBINSON LOWRY

1. I am Marcia Robinson Lowry. Together with Jeffrey O. Bramlett, I have served as co-lead counsel for the Plaintiff Class in this case. I am the Executive Director of Children's Rights ("CR"), and, along with Ira P. Lustbader, Associate Director of Children's Rights, I have been responsible for the supervision and conduct of my organization's work in this case. I give this Declaration in support of the Plaintiffs' Motion for Award of Attorneys' Fees and Expenses of Litigation.

2. As demonstrated by my resume, submitted with the other resumes of CR attorneys as Attachment I to this declaration and incorporated in this declaration,

I graduated from New York University School of Law in 1969. I have been an attorney litigating child welfare cases since 1970. For six years, I was the Director of the Children's Rights Project of the New York Civil Liberties Union, where I instituted and directed a program of litigation to reform the New York City child welfare system. From 1979 until 1995, I was the Project Director of the Children's Rights Project of the American Civil Liberties Union ("ACLU"), where I directed major litigation efforts in jurisdictions throughout the United States designed to promote major reform of child welfare systems. In 1995, I carried this work over to CR, which I founded.

3. I have been counsel in approximately 20 class action lawsuits representing hundreds of thousands of children against systems that have failed to provide lawful child welfare services including, for example:

- *LaShawn v. Barry,* a class action against the District of Columbia child welfare system for failure to comply with constitutional standards, federal statutes, and applicable District of Columbia law;
- *Baby Neal v. Casey,* a class action against the Philadelphia child welfare system and the Pennsylvania public welfare department for failure to comply with constitutional standards and applicable federal statutes;
- *Juan F. v. Rell,* a class action against the Connecticut social services system, based on

failure to comply with constitutional standards and applicable federal statutes;

- *Wilder v. Sugarman,* a challenge to New York's statutory scheme for the provision of foster care services on the grounds of racial and religious discrimination and violation of the establishment and free exercise clauses of the First Amendment;
- *G.L. v. Zumwalt,* a class action challenging federal statutory and constitutional infirmities within the foster care system in Kansas City, Mo;
- *Joseph A. v. New Mexico Dept. of Human Services,* a federal statutory and constitutional challenge to the foster care system in the state of New Mexico brought on a class basis;
- *Jeanine B. v. Thompson,* a class action against the Milwaukee County child welfare system and state of Wisconsin for failure to comply with local laws, federal statutes and federal constitutional protections applying to children at risk for placement or in foster care;
- *Sheila A. v. Finney,* a class action in state court against the Kansas child welfare system based on violations of state, federal statutory and federal constitutional law;
- *Marisol A. v. Giuliani,* a class action against New York City and State, regarding all aspects of New York City's child welfare system, for failure to comply with federal constitutional,

federal statutory, state constitutional, state statutory and state regulatory standards;

- *Charlie H. v. Whitman,* a class action against the New Jersey child welfare system and the State of New Jersey for failure to comply with constitutional standards and applicable federal law;
- *Foster Children Bonnie L. v. Bush,* a class action against the Florida child welfare system and the State of Florida concerning violation of foster children's rights under federal and constitutional law;
- *Brian A. v. Sundquist,* a class action against the Tennessee child welfare system concerning violation of foster children's rights under federal and constitutional law;
- *Olivia Y. v. Barbour,* a class action against the Mississippi child welfare system concerning violation of foster children's rights under federal and constitutional law;
- *Carson P. v. Heineman,* a class action against the Nebraska child welfare system concerning violation of foster children's rights under federal and constitutional law;
- *E.C. v. Blunt,* a class action against the Missouri governor and child welfare officials challenging the facial validity of an adoption assistance law on constitutional and statutory grounds.

4. During my professional involvement in the above class litigation, I have participated in at least 10

class-wide settlements including direct involvement in the negotiation of those settlements with state or local government officials and their counsel.

5. In addition to my litigation activities in foster care cases, I have written and spoken extensively on child welfare reform and foster care litigation. These speaking engagements and publications have included: Fordham Urban Law Journal, "Why Settle When You Can Win: Institutional Reform and *Marisol v. Giuliani*," Vol. XXVI, May 1999; Speaker/Panelist, St. John's Journal of Legal Commentary Symposium on Legal Reform and Children's Human Rights (April 9, 1999); and Speaker, American Bar Association's 9th National Conference on Children and Law (April 9, 1999). Other publications and professional activities are listed on my resume.

6. I have also presented testimony before both houses of Congress on child welfare and foster care issues, and in October 1998 I was a recipient of a Foundation for Improvement of Justice Award.

7. In addition to my own work on the case, I supervised the various lawyers, paralegals, and law student interns at CR who worked on this matter. The resumes of all of these attorneys, setting forth their qualifications and experience, are submitted as Exhibit I to this Declaration. I am familiar with CR's policies, practices, and procedures governing the recording and maintenance of time and expense records. I supervised staffing levels throughout this litigation and assigned attorneys to tasks only as

reasonably necessary to provide suitable representation to the plaintiff class.

8. Exhibit 2 to this Declaration is a summary of: (a) the total billable hours performed by CR lawyers and paralegals on this case through October 31, 2005, priced at the standard hourly rates customarily charged for professional services delivered to clients in the locality of this litigation; and (b) case expenses advanced by CR in this case through September 30, 2005, itemized by category of expense. The compilation of itemized time records on which the attorneys' fees portion of Exhibit 2 is based is attached as Exhibit 3. The compilation of case expenses advanced by CR on behalf of the Plaintiff Class through September 30, 2005 is attached as Exhibit 4. The compilation of itemized time records set forth in Exhibit 3 and the compilation of case expenses set forth in Exhibit 4 were both generated from a database of entries created in the ordinary course of CR's business by persons with actual knowledge of the events recorded at or about the time of the events recorded, and which have been maintained in the ordinary course of CR's business. Each compilation has been personally reviewed by myself or a senior level attorney who worked on this case, and charges have been reduced or written off which I deemed, in the exercise of my billing judgment, excessive. I believe these compilations of the time and expense records and the summary of them attached as Exhibit 2 to be an accurate and reliable account of the work performed

and the expenses incurred by CR and its personnel in this case.

9. During the period covered by this motion for fees, it was the consistent policy and business practice of CR to require each attorney, paralegal, and law student intern to maintain contemporaneous and specific records of all time worked in a particular case, and for such records to be entered in a computerized billing system. Each such employee received a weekly printout of his or her billing hours, and reviewed the records for accuracy and corrected any billing errors. All of the CR attorneys who worked on this case kept contemporaneous and specific records of all the work they performed. These records, submitted in Exhibit 3, are an accurate statement of the time spent on this litigation for which CR seeks compensation. I attest that all of the hours submitted in Exhibit 3 were reasonable and necessary in order to furnish adequate representation for the Plaintiffs.

10. The time records of my staff for which fees are sought were carefully reviewed to identify any discrepancies. When there was a substantial unexplained discrepancy between the times recorded by different attorneys present at the same event, such as a conference or a telephone call, the entries were reconciled so that Plaintiffs only billed for the lower time recorded. Where the event did not appear at all on one attorney's time sheet, Plaintiffs generally only billed for the attorney whose time sheets in fact reflected the event. For a handful of entries, and only where there were diary entries, travel records, or

other corroborating documentation reflecting that the attorney whose time records did not reflect the event having taken place were incomplete, that attorney's records were revised to indicate the attorney's participation in the event.

11. CR attorneys also have carefully reviewed all of CR's time entries, and in the exercise of responsible billing discretion, have excluded from their application significant time expended in conjunction with this litigation that might be viewed as excessive, redundant, or otherwise unnecessary to this litigation, as well as entries that are vague.

12. I have made reasonable efforts throughout the litigation to balance the workloads of the attorneys and paralegals working on this case to ensure that the work assigned to them was commensurate with their level of experience. I have made every effort to keep the number of staff assigned to the case to a minimum. I believe the case was appropriately staffed at all times by CR. Each of the attorneys, paralegals and law student interns working on this case had the ability and experience to perform the work assigned to him or her at a high degree of professionalism, and were appropriately supervised.

13. Throughout the litigation, I also made diligent efforts to hold expenses, which must be paid when incurred, to a minimum. Plaintiffs seek reimbursement for out-of-pocket CR litigation expenses totaling $ 1,010,714.54. Plaintiffs submit as Exhibit 4 to this declaration a detailed, itemized list of reimbursable

expenses for CR. The majority of the expenses incurred by CR in connection with this litigation were travel expenses. The numerous trips by CR attorneys to Atlanta, Georgia for meetings with sources, meetings with local counsel, conferences with the Defendants, and Court appearances were all necessary to effectively litigate this case. I, along with the other CR attorneys working on this case, made concerted efforts to minimize the number and cost of trips to Georgia, as well as the number of attorneys who participated in each trip.

14. To present to the court the value of CR attorney time in the above-captioned litigation, I have applied in Exhibit 2 the prevailing professional rates in the Atlanta legal market, as provided to me by experienced, private counsel in Atlanta. Despite the fact that CR lawyers are particularly well-suited to handle cases like this one efficiently because of their experience with and professional focus on child welfare litigation, valuation of their labor at the straight hourly rates in Atlanta under-compensates CR for its work because CR carries New York City levels of business overhead and because CR undertakes substantial financial risks to mount a case on behalf of foster children while fronting the costs of investigation, litigation and expert time and expense.

15. Beginning in 2001, attorneys at CR commenced an intensive investigation into Georgia's foster care system, particularly as that system was operated in Fulton and DeKalb Counties, in order to identify any and all pervasive problems and systemic deficiencies

in the services and placements being provided to children. This extensive pre-filing investigation of the Georgia foster care system, which included meeting with dozens of sources, usually in confidence, reviewing thousands of pages of documentation, assessing the system's management structure and service delivery systems, and identifying appropriate Named Plaintiffs and Next Friends, was both reasonable and necessary to prepare the Complaint in this action.

16. In addition to performing extensive pre-filing fieldwork and investigations, CR attorneys subsequently became primarily responsible for, among other things, drafting and finalizing the Complaint, drafting and responding to motions, conducting factual and expert discovery, reviewing and analyzing the thousands of pages of documents produced by Defendants, preparing a final pretrial order under court rules, interviewing potential trial witnesses, preparing for trial, and negotiating and drafting the comprehensive Settlement Agreement.

17. I, with the assistance of other CR attorneys, also engaged a team of lawyers from Georgia to represent Plaintiffs. Jeffrey O. Bramlett, a partner with the Atlanta firm of Bondurant, Mixson & Elmore, LLP, agreed to serve as my co-counsel and to provide additional legal staff.

18. Based upon my considerable experience in child welfare class action litigation, as more fully described herein and in my attached resume, it is my strong

opinion that Plaintiffs' preparation of the above-captioned matter for trial required a major investment of professional time and expense that exceeded the significant effort reasonably anticipated by CR at the time of initial filing. Specifically, a substantial amount of the attorney work and related expenses included in CR's billing records flowed directly from (1) the need to surmount fundamental data deficiencies encountered in the challenged system and (2) the need to overcome certain overly aggressive and unnecessary litigation tactics adopted by the Defendants.

19. In relation to the former point, as Plaintiffs endeavored in the course of discovery to gather and assess performance data from the challenged system, it became quite clear that Defendants lacked a reliable data management system. Not only was the state of Georgia found to be grossly behind in its development of a federally acceptable Statewide Automated Child Welfare Information System ("SACWIS"), but its existing data system was found to contain incomplete and unreliable information because of widespread deficiencies in basic data entry and quality assurance practices. Plaintiffs, therefore, were required to undertake a comprehensive, individual case record review process, utilizing a team of retained experts and case readers, in order to collect the statistically valid and reliable data needed to prove systemic problems in the challenged system. Plaintiffs' case record reviews, reasonably designed and undertaken to capture essential and basic performance data, were made even more expensive by Defendants' (1) refusal to undertake

the case record reviews jointly and at shared expense and (2) insistence on conducting an independent, Defendant-supervised case records review using the Child Welfare League of America as outside expert. The duplicative case record review made for additional expert reports and depositions.

20. In relation to the latter point, Defendants' extraordinary decision to seek summary judgment at the initial close of discovery in this matter, a wholly unreasonable tactic deployed in the face of an enormous discovery record literally overflowing with disputed factual issues, required Plaintiffs to invest major amounts of additional attorney time and expense. Plaintiffs were required to devote substantial time in preparing a response to Defendants' motion for summary judgment and the accompanying exhaustive statement of "undisputed facts." As later determined by this Court, Defendants' proffered set of "undisputed facts," in truth, contained myriad disputed and material factual matters. At great time and expense, Plaintiffs were required to identify these disputed facts for the court in their responsive filing and to provide specific record citations in opposition pursuant to the applicable rules of procedure for responding to a summary judgment filing.

21. Moreover, the prolonged passage of time occasioned by Defendants' filing of a motion for summary judgment and plaintiffs' response gave rise to a "staleness" concern in relation to the voluminous data compiled in Plaintiffs' initial case record reviews.

Plaintiffs, therefore, were required to undertake additional case record reviews to update their evidence of systemic failings. These updated case record reviews naturally gave rise to additional expert reports and an additional round of expert depositions, all at great cost. In summary, Defendants' litigation tactics forced upon Plaintiffs a mountain of work that has added substantially to the total fees and expenses now sought in the pending motion. In no other child welfare class action have I or CR encountered such a duplicative set of case record reviews or the filing of a summary judgment motion at the close of discovery by defendants.

22. As reflected in my declaration dated September 16, 2005, and submitted to the Court for purposes of the fairness hearing in this matter, the Settlement Agreement reached by the parties here mandates substantial reforms and improvements in almost every facet of the DFCS foster care operations in Fulton County and DeKalb County. Based on my close to 30 years of experience in the field of child welfare law and my involvement in numerous similar institutional reform litigations throughout the country, it is my opinion that this settlement constitutes an exceptionally favorable result for the plaintiff class. The proposed settlement provides for a judicially enforceable consent decree on behalf of a certified class of children with continuing jurisdiction of the District Court, as well as court-appointed joint monitors who will issue frequent and regular public reports

regarding the state's compliance with the consent decree.

23. Among many other provisions, under the proposed settlement, the state must provide significant resource and infrastructure improvements in the system, such as additional caseworkers to meet strict workload limits for all child protective services, ongoing services, foster care and adoption case workers, as well as supervisors; new and additional foster homes and services to fill any shortages identified in a "needs assessment" of the system to be performed by a neutral expert; and a fully implemented single statewide automated child welfare information system so that workers and managers can make critical decisions based on complete and accurate information. In addition, the proposed settlement guarantees a litany of protections for all class members, including comprehensive medical, dental and mental health examinations and treatment; a detailed process for goal setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children to better protect their safety and well-being in foster homes and facilities, such as the use of emergency shelters, group and institutional placements, and protections against overcrowding in foster homes; required processes for the investigation of maltreatment of children while in foster care; and the establishment of reimbursement rates adequate to compensate providers for the actual cost of caring for foster children.

24. Further, the proposed settlement mandates that the state meet and sustain compliance with an entire set of measurable outcomes in 31 areas of child welfare results and performance. Combined with the resource requirements, and infrastructure, process and other protections also mandated in the proposed settlement, these outcome measures are designed to lead to rapid and significant improvement in the lives of current and prospective class member foster children.

25. The standard hourly rates reflected in Exhibit 2 are fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment and performance. These standard hourly rates do not, however, take into account the fact that class counsel was required in this case to advance the entire $1.7 million expense of prosecuting this case for the benefit of the class, or the fact that class counsel's compensation was totally contingent upon prevailing in this action.

26. The expenses reflected in Exhibit 4 were actually expended to prosecute this action. These expenses were reasonable and necessary to protect the interests of the class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of December, 2005.

/s/ Marcia Robinson Lowry
Marcia Robinson Lowry

Sworn to before me this
8th day of December, 2005

/s/ Margaret A. Ross
Notary Public

MARGARET A. ROSS
Notary Public, State of New York
No. 02RO6099029
qualified in Kings County
Commission Expires 9/22/07

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al.,	:	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS
Plaintiffs,	:	
v.	:	
SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al.,	:	
Defendants.	:	

DECLARATION OF JEFFREY O. BRAMLETT

1. I am Jeffrey O. Bramlett. Together with Marcia Robinson Lowry, I have served as co-lead counsel for the Plaintiff Class in this case. I am a member of the Atlanta law firm Bondurant Mixson & Elmore, LLP and I am the partner responsible for supervision of my firm's work on this case. I give this Declaration in support of the Plaintiffs' Motion for Award of Attorneys' Fees and Expenses of Litigation.

2. I am a member of the Bar of this Court, the State Bars of Georgia and Texas, the Bar of the United States Supreme Court, the Bars of the United States Courts of Appeals for the Eleventh, Fifth and Federal Circuits, and have been admitted in various other courts and jurisdictions. I am a 1980 graduate of the

University of Texas School of Law, where I was a Notes Editor on the *Texas Law Review*. Prior to commencement of private practice, I served as law clerk to Hon. Jerre S. Williams, United States Court of Appeals for the Fifth Circuit. Since 1981, I have continuously engaged in the private practice of law in the City of Atlanta, Georgia.

3. My law practice is devoted exclusively to trial and appellate litigation and dispute resolution, with an emphasis on business litigation, professional liability litigation, employment and civil rights litigation. I have received and held Martindale-Hubbell's highest "AV" rating for approximately twenty years and have been recognized through peer review and client review processes for inclusion in multiple editions of Marquis' "Who's Who in American Law", Woodward/White's "Best Lawyers in America", Chambers' USA "America's Leading Lawyers for Business", Law&Politics/Atlanta Magazine's "Georgia Super Lawyers", and Georgia Trend's "Legal Elite". I am a past president of the Atlanta Bar Association. For the past eleven years, I have been elected by Atlanta's lawyers to serve on the State Bar of Georgia's Board of Governors, where my Board colleagues have elected me to serve on the Board's Executive Committee. I have previously chaired the Atlanta Bar Association's Section on Litigation, the State Bar's Individual Rights and Responsibilities Section, the State Bar's Advisory Committee on Legislation, and the Board of Trustees of the State Bar's Client Security Fund. For the past decade I have participated as

a member and Master of the Bench of the Lamar Inn of Court. I have written and lectured for various continuing legal education programs sponsored by the American Bar Association's Section on Litigation, Georgia Bar's Institute for Continuing Legal Education, the National Institute of Trial Advocacy, the Atlanta Bar's Section on Litigation, Emory University School of Law, and Georgia State University's School of Law on topics involving trial advocacy, litigation, class actions and other complex litigation, jury selection, and professional responsibility.

4. During a quarter century at the bar, I have become familiar with the economics of law practice, billing rates, billing practices, the cost and recovery of litigation support services (including the services of expert witnesses and consultants), and the setting and collection of legal fees in a variety of circumstances, including cases presenting professional demands, factual and legal complexity, and risk and expense levels comparable to the instant case. I have derived this knowledge from personal experience negotiating fee agreements with sophisticated consumers of legal services, billing and collecting fees and expenses from clients and/or adverse parties in the legal marketplace, and regularly representing plaintiffs and defendants on an hourly rate basis as well as on contingent fee or hybrid hourly/contingent fee arrangements. I have also derived this knowledge from management responsibilities at my law firm, bar activities at the local, state and national

level, practice experience representing more than seventy-five lawyers and their law firms in disputes with present or former clients or in bar discipline matters, research performed in support of CLE lecturing and expert witness work, and practice experience supervising other lawyers and law firms.

5. I am familiar with my firm's policies, practices and procedures governing the recording and maintenance of time and expense records at Bondurant Mixson & Elmore, LLP ("BME"). I am also familiar with BME's standard hourly rates ("Standard Hourly Ra es") customarily charged for professional services del vered to clients: (a) who hire BME for a particular case or matter on a purely hourly basis and generally pay their bills within a 30-60 day cycle; (b) who shoulder full responsibility for the expenses of their case and relieve BME of any financial risk associated with carrying case expenses for an indefinite period of time; (c) who agree to pay BME its fee calculated on an hourly basis without regard to the ultimate result obtained in the case; and (d) for whom neither a premium billing rate arrangement nor a discounted billing rate arrangement is appropriate and agreed to in advance.

6. Exhibit 1 to this Declaration is a summary of: (a) the total billable hours performed by BME lawyers and legal assistants on this case through October 31, 2005, priced at Standard Hourly Rates; and (b) case expenses advanced by BME in this case through October 31, 2005. The compilation of itemized time records on which the attorneys' fees portion of Exhibit

1 is based is attached as Exhibit 2. The compilation of case expenses advanced by BME on behalf of the Plaintiff Class through October 31, 2005 is attached as Exhibit 3. The hourly rates set forth in Exhibit 1 correctly reflect the hourly rates my law firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis. The compilation of itemized time records set forth in Exhibit 2 and the compilation of case expenses set forth in Exhibit 3 were both generated from a database of entries created in the ordinary course of BME's business by persons with actual knowledge of the events recorded at or about the time of the events recorded, and which have been maintained in the ordinary course of BME's business. I have personally reviewed the entries in each compilation and reduced or wrote off charges which I deemed, in the exercise of my billing judgment, excessive. I believe these compilations of the time and expense records and the summary of them attached as Exhibit 1 to be an accurate and reliable account of the work performed and the expenses incurred by BME and its personnel in this case to prosecute the class claims against the State Defendants.

7. From the inception of our work on this case, I have personally supervised and managed the work of BME personnel. BME lawyers and support staff who performed services for the Plaintiff Class on this case include:

(a) **Corey F. Hirokawa** – Corey is a *summa cum laude* graduate of Dartmouth

College (1995) and received her law degree, with highest honors, from Emory University School of Law in 2000, where she was Order of the Coif and served as Executive Managing Editor of the *Emory Law Journal*. Between college and law school, Corey worked as a professional journalist. Her legal scholarship is published in both the *Emory Law Journal* and the *Northern Kentucky Law Review*. After law school Corey served as law clerk to Hon. Diane P. Wood of the United States Court of Appeals for the Seventh Circuit. Since 2001, Corey has practiced law as an associate of BME, where she has worked on a variety of complex civil litigation, including class actions. She began working on this case in April 2002, has worked on the case continuously since that time, and has assumed and discharged professional responsibility for the representation of the Plaintiff Class at quality, efficiency and consistency levels well beyond what is typical for lawyers of her experience. Her current Standard Hourly Rate, based upon her practice experience level, is $240, but the superior quality of her performance, her efficiency, and the elevated level of responsibility she discharged in this case – coupled with the result achieved for the clients – would warrant a premium of 25-40% in the Atlanta marketplace for legal services.

(b) **Lynn M. Adam** – Lynn is a 1988 graduate of George Washington University. She received her law degree from George

Washington University School of Law with high honors in 1994, where she was Order of the Coif and served as Managing Editor of the *George Washington Law Review*. Between college and law school, she served as an active duty officer in the United States Navy. Lynn served as law clerk to Hon. Karen Williams of the United States Court of Appeals for the Fourth Circuit. Lynn practiced law as a BME associate from 1996-2003, when she accepted a position as an Assistant United States Attorney in the Northern District of Georgia. The current minimum Standard Hourly Rate for BME lawyers with Lynn's professional credentials and experience level is $290.

(c) **Gordon L. Hambrick, IV** – Gordon, a *summa cum laude* graduate of Emory University, received his law degree with high honors from Emory University School of Law in 2001, where he was Order of the Coif and served as Executive Articles Editor on the *Emory Law Journal*. Upon graduation from law school, Gordon served as law clerk to Judge Stanley Birch of the United States Court of Appeals for the Eleventh Circuit. Gordon practiced law with BME as an associate from 2002-2004, when he accepted a position as law clerk to Judge Debra Bernes of the Georgia Court of Appeals. The minimum current Standard Hourly Rate for lawyers of Gordon's professional credentials and experience level is $225.

(d) **Jennifer L. (Auer) Jordan** – Jen is a 1997 *magna cum laude* graduate of Georgia Southern University. She received her law degree *magna cum laude* from the University of Georgia School of Law in 2001, where she was Order of the Coif and served as Article Editor of the *Georgia Law Review.* After serving as law clerk to Judge Anthony A. Alaimo of the United States District Court for the Southern District of Georgia, Jen practiced law as an associate of BME from 2002-2005. The minimum current Standard Hourly Rate for lawyers of Jen's professional credentials and experience level is $225.

(e) **Nichole G. Iannarone** – Nichole holds a B.A., *magna cum laude*, from Brenau University Women's College and received her law degree from Yale University's School of Law in 2002, where she served on the *Yale Journal on Regulation*. Nichole joined BME as an associate in 2002 and has continuously practiced law here since. The minimum current Standard Hourly Rate for lawyers of Nichole's professional credentials and experience level is $225.

(f) **Alison B. Prout** – Alison is a 1998 *magna cum laude* graduate of the University of Pennsylvania. She received her law degree *cum laude* from Harvard University's School of Law in 2004, where she served as Executive Editor of the *Harvard Negotiation Law Review*. She joined BME as an associate in 2004. The minimum current Standard Hourly Rate

for lawyers of Alison's professional credentials and experience level is $215.

(g) Tanya C. Reed – Tanya is a 1990 graduate of the University of Georgia with fifteen years of experience as a paralegal at BME. She has served as primary case manager and lead trial paralegal in numerous federal and state court trials. She has also served as primary case manager and lead trial paralegal in more than a dozen class actions, including *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685 (2001). She began work on this case in August 2002 and has worked continuously on this case since that time. Her skill and experience in managing documents, vendors, and coordinating the logistics of delivering legal services in complex cases where multiple law firms and law offices are participating in the representation of a class or client group enabled the efficient delivery of superior quality service to the Plaintiff Class in this case and contributed significantly to the outstanding result achieved for the benefit of the clients. Her current Standard Hourly Rate is $150, but the specific relevance of her job skills and professional experience to the tasks required in this case – coupled with the quality of her performance and the result achieved for the clients – would warrant a 20 30% premium in the Atlanta marketplace for legal services.

Other BME lawyers and support staff also devoted work for the benefit of the Plaintiff Class in this

case. I personally reviewed each of the time entries charged to this case and exercised ordinary billing judgment in writing down or writing off charges I deemed inappropriate from the itemization of time records attached as Exhibit 2.

8. The work required to prosecute this case over the past three years is detailed in Exhibit 2 and in the time records submitted in conjunction with the Declaration of Marcia Robinson Lowry. A summary of the necessary work follows.

This undertaking was comparable in scope, time demands, expense, and professional challenge to a major piece of class action business or employment litigation. Pre-suit investigation and planning began months before the initial complaint was filed. The work entailed intense factual investigation, the selection of appropriate class representatives and next friends, and the vetting of available legal theories that might be asserted to advance the class' interests in achieving systemic reform. The pre-filing work required careful analysis of the feasibility of achieving class certification. A complaint satisfying Rule 11 requirements had to be drafted, researched and vetted. Pre-filing work also included conducting a meeting with a former commissioner of the Department of Human Resources, his counsel, and key staff to explore the possibilities of a pre-suit resolution or the narrowing of issues.

The early stages of the case involved the necessity and time-sensitivity of seeking preliminary

injunctive relief to protect class members from the deficient and dangerous "emergency" shelters operated in Fulton and DeKalb Counties. There followed several months of briefing class certification issues and the necessity of responding to each defendant's motions to dismiss.

Beginning in 2003 and extending into 2004, preparation of the case required extensive, fact-intensive discovery of the defendants' operation of child welfare systems in Fulton and DeKalb Counties. This discovery included the preparation of interrogatories and requests for production, review and analysis of more than 477,000 pages of documents produced by the Defendants, time-consuming negotiations with defendants over the adequacy and timeliness of discovery responses and motion practice required to obtain discovery resisted by Defendants, and the conduct of sixty-three depositions. Running parallel to formal discovery was an ongoing effort to investigate facts and develop the case through communication and interviews with a variety of individual class members, foster parents, service providers, and other stakeholders of Georgia's child welfare system. Because the case addresses important issues of public policy and the conduct of governmental defendants, there was also an important public dimension to the case that required class counsel to pay attention to the inquiries of journalists and other governmental officials to ensure that the class' interests in the court of public opinion were protected and advanced.

Throughout 2003 and into 2004, extensive work was required to identify and select appropriate child welfare experts who could analyze the raw information we discovered and render appropriate and admissible opinion testimony detailing the systemic deficiencies uncovered by our discovery and investigation. Defendants' decision to file motions for summary judgment challenging each and every claim we brought on behalf of the class triggered the necessity of a massive and time-pressured effort to organize the information at our disposal establishing the existence of triable facts and to brief the applicable law. Because defendants had expressed little or no interest in exploring settlement before the Court ordered the parties to mediation in 2004, it was necessary to do the work required to prepare a draft pre-trial order, proposed findings of fact and conclusions of law, and to have the plaintiffs' case ready for trial set for mid-February 2005.

Once mediation began in January 2005, the intensive settlement negotiations that ensued required extensive preparation, additional factual investigation and analysis, vetting of Accountability Agent candidates and other features of the settlement as it was taking shape, and time-consuming give-and-take in both face-to-face sessions and through the buffer of the Court's appointed mediator. These negotiations continued into June, when the proposed consent decree now approved by the Court was executed. Throughout this period, because there was no certainty that the mediation would succeed in

producing a settlement, it was necessary for class counsel to remain ready to try the case on short notice if talks broke down.

Over the next four months, class counsel drafted class notice, motion for preliminary settlement approval, fielded inquiries about the proposed settlement from many class members and other interested child welfare system stakeholders. Class counsel reviewed and analyzed the comments of persons who offered submissions in response to the class notice and order of preliminary approval and discussed comments and objections with their proponents. Class counsel drafted a joint motion for final approval and prepared the presentation delivered to the Court at the fairness hearing on the fairness, adequacy and reasonableness of the proposed settlement. Class counsel participated in the preparation of proposed findings of fact and conclusions of law for the Court's consideration in connection with the motion for final approval of the proposed settlement.

Finally, class counsel has attempted to obtain consensual resolution of the issue of fee and expense recovery. Counsel for State Defendants has insisted that the State cannot respond to plaintiffs' concrete proposal of compromise unless and until counsel for State Defendants is first given the opportunity to review and criticize the detailed time and expense records put before the Court in connection with this application. While class counsel remains hopeful that State Defendants will begin to negotiate in good faith on the basis of all information presented in support of

plaintiffs' fee application, Defendants' unilateral insistence of its conditions for entering into any negotiation has further delayed plaintiffs' fee and expense recovery and has further expanding [sic] the scope of the State's liability.

9. Given the scope of the undertaking required to prosecute this case, the work necessitated by the State Defendants' approach to defending the case, and the extraordinary relief secured for the class by these efforts, the quantity of time devoted by BME and CRI professionals to the prosecution of this case is reasonable and fully deserving of compensation. While the size of the class will ultimately grow over time as additional children come into DFCS' custody in Fulton or DeKalb during the duration of the Consent Decree, viewed solely from the perspective of the existing 3,000 class members, each individual child's case was resolved through this class action with less than ten (10) hours of professional services per class member. To the extent that the effect of this settlement will ultimately cause improvement in Georgia's child welfare system beyond the borders of Fulton and DeKalb Counties, a far larger number of children than the 3,000 current class members will benefit from the services performed. Therefore, the legal services which are the subject of this fee application have been delivered in a highly efficient and cost-effective manner.

10. The Standard Hourly Rates reflected in Exhibit 1 are fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal

services of comparable quality rendered in cases demanding similar skill, judgment and performance. These Standard Hourly Rates do not, however, take into account: (a) the fact that class counsel was required in this case to advance the entire $1.7 million expense of prosecuting this case for the benefit of the class; (b) the fact that class counsel has not been paid on a 30-60 day cycle during the course of the past three-plus years; or (c) the fact that class counsel's compensation was totally contingent upon prevailing in this action. It is my opinion and belief that lawyers and law firms in the Atlanta market for legal services with the experience and qualifications to perform the necessary work and shoulder the necessary financial risks to bring this case would not accept Standard Hourly Rates where these conditions obtain and would, instead, insist upon a premium in the 50%-200% range in return for accepting these risks and costs.

11. The expenses reflected in Exhibit 3 were actually expended to prosecute this action. These expenses were reasonable and necessary to protect the interests of the class.

12. A major expense advanced by class counsel for the benefit of the plaintiff class was the cost of compensating expert witnesses and case record reviewers for the work they performed to analyze and report upon the systemic performance of Georgia's child welfare system. In October, 2002, class counsel approached counsel for State Defendants with a proposal to split the cost of a neutral expert to be

appointed by the Court to perform the necessary case record review analysis and to issue a report by which both sides would be bound. State Defendants refused to participate in this proposal and, as a result, Plaintiffs were forced to spend more than $800,000 – and, based upon responses to Open Records Act requests, the State appears to have spent approximately $1 million – on separate, duplicative case record reviews and expert reports. Counsel for State Defendants now takes the position that the expenses advanced by class counsel for these purposes cannot be recovered in light of *West Virginia University Hosp. v. Casey*, 499 U.S. 83 (1991).

13. Standard Hourly Rates are predicated on the assumptions that the client will pay in full on a 30-60 day cycle, that counsel is not required to shoulder any significant financial risk of unreimbursed case expense, and that counsel will be paid currently regardless of the result ultimately achieved. Here, Class Counsel was forced to advance case expenses approaching $1.7 million to protect the Class' interests, largely because State Defendants refused Plaintiffs' suggestion of a neutral case record review that would have saved both sides (and ultimately the State) duplicative cost. Here, Class Counsel was forced to personally advance Plaintiffs' portion of that cost in the face of State Defendants' vigorous assertion that it would not and could not be recovered. Here, Class Counsel's recovery of any cost, let alone fee, was utterly dependent upon the contingency of a successful result. Here, Class Counsel was forced to invest

more than $8.85 million of professional time and out-of-pocket expense over a three-and-one-half year period with no assurance of any recovery.

14. I am generally familiar with fee requests and fee awards made in other Rule 23 cases in this District, in the Eleventh Circuit, and in the state courts of Georgia. The fee in comparable cases requiring comparable work, risk and investment under Rule 23 is commonly and customarily set in accordance by a percentage of the common fund/common benefit achieved for the class, with 25% of the common fund/common benefit being a presumptively fair fee. Given the risks apparent at the outset of this case and the costs required to prosecute these claims, it is my opinion and belief that counsel with the experience and qualifications to perform the work and to make the investment required in this case would have found this endeavor extremely unattractive from a cost and risk perspective if the only recovery available for obtaining an extraordinary result for the class was years-deferred payment of Standard Hourly Rates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of December, 2005.

/s/ Jeffrey O. Bramlett
Jeffrey O. Bramlett

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al., Plaintiffs, v. SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS

DECLARATION OF
RALPH I. KNOWLES, JR

1. My name is Ralph Knowles. I am a member of the Bar of this Court and a member of the Atlanta law firm Doffermyre, Shields, Canfield Knowles & Devine, LLC. I am a graduate of the University of Alabama and its School of Law (1969), where I was awarded membership in the Order of the Coif and served as an editor of the *Alabama Law Review*. My law practice was located in Tuscaloosa, Alabama from 1969 until 1991 except for the period from 1978 to 1981 when I was the Associate Director of the National Prison Project of the ACLU in Washington, D.C. In 1991, I moved to Atlanta, Georgia where I have since maintained my practice.

2. During my thirty-six years of law practice, I have represented civil plaintiffs, civil defendants and criminal defendants. For two years, at the beginning of my private practice, I was also a staff lawyer for the Selma Inter-Religious Project that was established by the national churches to represent poor and African-American people in the Black Belt of Alabama. I was fortunate to be a primary counsel in major class action institutional litigation in the 1970's involving prisons and mental health institutions. One such case resulted in the landmark comprehensive prison conditions order by Hon. Frank M. Johnson, Jr. which transformed (at the time) the entire prison system in Alabama. *Pugh v. Locke,* 406 F.Supp. 318 (M.D. Ala.1976) aff'd and remanded sub.nom., *Newman v. Alabama,* 559 F.2d 293 (5th Cir. 1977), cert. denied in relevant part sub. nom. *Alabama v. Pugh,* 438 U.S. 781 (1978). Another such case was *Lynch v. Baxley,* 386 F.Supp. 278 (M.D. Ala. 1974) (three-judge court) through which the then existing Alabama Civil Commitment Statutes were declared unconstitutional. New stringent standards were required and the remedial recommitment hearings for all persons involuntarily committed resulted in the release of one-third of them and the transfer of seven hundred more to less restrictive conditions.

3. As the Associate Director of the National Prison Project of the ACLU, I supervised and conducted litigation around the country involving prisons, jails and juvenile institutions. Among the cases in which I was a primary counsel were *Ramos v. Lamm,* 485

F.Supp. 122 (D. Colo. 1981); *aff'd* in relevant part, *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980) (after six week class action trial, comprehensive judgment entered relating to conditions in the Colorado maximum security prison) and *Duran v. Apodaca,* (Unreported) (D. N. Mex. 1980) (at the time most comprehensive prison conditions order in history by settlement). Some other cases in which I have been primary counsel and which may be relevant to this Declaration are listed in my resume attached as Exhibit 1.

4. In more recent years my practice has focused on representation of plaintiffs in class actions, mass torts and other complex litigation involving products, liability, toxic torts, and consumer law. I have been lead counsel or co-lead counsel for plaintiff classes or for aggregated plaintiffs in mass torts. I have often lectured on subjects involving class actions and other complex civil litigation. I am a member of the Bleckley American Inn of Court, the American Law Institute and a Fellow of the American College of Trial Lawyers.

5. I have been involved in a number of cases similar to this case in terms of factual complexity, difficulty in terms of unsettled law, and which required lawyers of comparable skills, judgment, reputation and experience to lawyers prosecuting this case. I am generally familiar with the hourly rates and expense reimbursements currently and customarily charged for the delivery of comparable legal services and with alternative billing arrangements commonly and customarily used to engage counsel in work of this type. I am also generally familiar with fee awards to

successful class counsel in Rule 23 cases in this District and Circuit.

6. To familiarize myself with the scope of this case and the work and expense required to prosecute it, I have reviewed the docket sheet as of November 1, 2005, the Court's order published at 218 F.R.D. 277 (N.D.Ga 2003), and the Court's Orders of July 5, 2005 and October 27, 2005 granting preliminary and final approval, respectively, of the Consent Decree entered at Docket # 488. I have also reviewed the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett with accompanying accountings of work performed and expenses incurred by counsel for the plaintiff class to prosecute this action.

7. As a result of my personal experience serving as plaintiffs' class counsel, managing class actions and other mass tort cases as well as participating in my firm's work as counsel in other class cases presenting comparable factual complexity, legal uncertainty, and requiring comparable skill, judgment, and financial resources to prosecute the claims of a plaintiff class, I am well aware of the risks and costs entailed to prosecute a class case of this magnitude. Given the nature and complexity of the case, the amount of time devoted to the case and the amount of out of pocket expenses advanced to prosecute the case by class counsel are, in my experience and judgment, fair, reasonable, and fully deserving of **adequate and full** compensation.

8. The results obtained in this case are exceptionally favorable to the plaintiff class, especially in the current environment for civil rights class actions seeking sweeping injunctive relief. I wholeheartedly agree with the Court in its finding that "the results achieved by the parties to be extraordinary." I have worked on many cases seeking injunctive relief against state and local governments over the past thirty-six years and I have kept abreast of many others by reading published decisions. The outcome of this case represents a highly-constructive vindication of the class members' constitutional rights through the enhanced assurance and delivery of governmental services. This case exemplifies the operation of Rule 23 as a tool for the vindication and enforcement of constitutional rights at its best. It is obvious from the docket sheet that the case was fiercely contested and hard-fought. To obtain class certification, to successfully resist the State's repeated attempts to cause the case to be dismissed as a matter of law, and then to achieve the sweeping relief provided in the Consent Decree after more than three years of vigorously-contested litigation and extended mediation required an extraordinary degree of effort and investment by class counsel and produced an exceptional result for class members.

9. I have known Jeff Bramlett for 15 years. He is a consummate professional of the highest integrity. In addition, he is one of the finest lawyers I have known. I have often referred cases to him because of his skills and his integrity. In today's judicial climate, few

lawyers in private practice with the skills to achieve the results gained here would be willing to take on such a case with only a chance that attorneys fees and expenses would ultimately be awarded and knowing that even if successful, it is now unlikely that the successful lawyer will be paid what he or she would deserve through ordinary litigation. It is a tribute to him, but not a surprise to me, that he and his colleagues have handled this and handled it so well.

10. My firm currently handles almost no cases that are not for plaintiffs and pursuant to contingent fee agreements. If we were limited to receiving a normal hourly rate for our services, we could not represent the plain folks that we do. Due to the growing complexity of litigation generally, the need for qualified experts and the tactical decisions exercised by most defendants, it is not uncommon for us to spend over a million dollars – often several million dollars – in out of pocket expenses before concluding a case. Of course, if we lose the case, we just lose the money as well. If we win the case, hopefully our judgment or settlement will be sufficient to pay us back our expenses (often years later) and provide us fair and adequate compensation for our time and efforts. Jeff Bramlett and his colleagues found themselves in precisely the same situation in this case. I am not at all surprised that their out of pocket expenses are $1.7 million. I am not at all surprised at the amount of time submitted to achieve the results obtained. They deserve to be fairly and adequately paid as if this were a typical mass tort case and not a statutory

fee-shifting case. If they are not, others will refuse to take on meritorious cases for true victims like those getting relief here.

11. As a result of my personal professional experience, my work on other cases, and my review of published decisions in class actions, I am generally familiar with fee requests and fee awards in class actions decided and approved in the state courts of Georgia, this Federal District, and the Eleventh Circuit. In the current Atlanta market for legal services, the Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would be generally insufficient to induce lawyers of comparable skill, judgment, professional reputation and experience to perform the necessary services to prosecute a case of this magnitude on terms where the lawyers are not paid on an ongoing basis as the work is being performed, are required to advance case expenses of nearly $1.7 million over a three year period with no ongoing reimbursement, and the lawyers' ability to recover a fee and expense reimbursement are completely contingent on the outcome of the case. The customary compensation for legal services performed on these terms in Rule 23 cases in both state and federal courts in this district is a "percentage of the common fund/common benefit" approach, with 25% of the common fund/common benefit, cross-checked against a multiple of the lodestar, constituting a presumptively fair fee.

12. Successful class counsel in securities, antitrust, products liability, toxic torts, and consumer law class

or mass actions brought under Rule 23 presenting comparable risks, costs, complexity and legal uncertainty, who delivered a result for the class comparable to the one embodied in the October 28, 2005 Consent Decree in terms of its extraordinary favorableness to the class would, based on prior decisions in this district and circuit, recover a multiple of no less than 1.5-5 times lodestar. It is clear to me that these counsel deserve the high end of the multiplier range and if I were the Court I would give a multiplier of 5.

13. I have served as plaintiff's counsel in more than a hundred civil rights and civil liberties cases. I have historically been active in the plaintiffs' civil rights bar. I have regularly participated in a variety of organizations – ranging from NOW Legal Defense and Education Fund to the American Civil Liberties Union – whose objectives are to advance the cause of civil rights and civil liberties and to recruit counsel for civil rights plaintiffs. As a result of my personal practice experience and my personal involvement in the segment of the legal community that devotes itself to the delivery of legal services to civil rights plaintiffs over the course of the past thirty-six (36) years, I am generally familiar with the Atlanta marketplace for legal services in the plaintiffs' civil rights area.

14. During my seventh year of law practice, Congress enacted The Civil Rights Attorneys' Fees Act of 1976 (42 U.S.C. § 1988) (hereinafter "§ 1988" or "the Act"). At first, it had a major impact in encouraging

private lawyers in this Circuit to undertake challenging and meritorious civil rights enforcement cases at significant financial risk to themselves. Over the years, however, I believe that a series of court decisions applying the Act departed from the Congressional purpose of fully and fairly rewarding lawyers who perform public service and undertake personal financial risk to vindicate fundamental constitutional rights. Although the recovery of an award of fees and expenses in any civil rights class action is contingent upon achieving a successful result, I believe that court decisions have often construed § 1988 to limit the recoveries available to civil rights counsel to a lodestar compensation formula driven by hourly rates that are not directly comparable to reasonable fees in contingent fee class cases. The hourly fees on which § 1988 awards are most often based are derived from situations in which counsel are paid hourly fees and reimbursed any expenses advanced on a 30-60 day billing cycle without regard to whether the case is ultimately won or lost. This approach to compensation takes into account neither the risk of contingency nor the heavy financial burden of funding a multi-year case without client reimbursement. As a result, lawyers who perform the public service of vindicating fundamental constitutional rights are often paid very poorly relative to lawyers who achieve comparable results for a class in the fields of antitrust, securities, products liability, consumer or toxic tort class action litigation. There is, in my experience and opinion, no principled basis for consigning lawyers who bring

successful civil rights suits to second-class citizenship when it comes to being compensated for their work and the risks they undertake to perform a public service that the public policy of the United States, codified in the Act, specifically encourages. In my opinion and in my personal experience, the legislative purpose underlying the Act has been undermined and, in some cases, subverted by these developments. The effect has been to discourage lawyers from bringing these cases, to reduce the access of civil rights plaintiffs with meritorious claims to courts, and to undermine the enforcement of our nation's civil rights laws.

15. If, in this case where counsel obtained an exceptional result, the Court limits fee recovery to lodestar derived from Standard Hourly Rates which do not take into consideration the risks and costs of advancing and carrying $1.7 million of case expenses over a three year period and which do not take into consideration the risk of committing more than 29,000 hours of labor to a case for which the fee would have been zero if plaintiffs had not prevailed, the Court's decision will further chill the bringing of civil rights cases. On the other hand, a fee and expense award that fully and fairly compensates class counsel on a par with non-civil rights cases will improve the access of civil rights plaintiffs to counsel in the Atlanta market for legal services and would advance the legislative purposes for which § 1988 was enacted.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4 day of December, 2005.

/s/ Ralph I. Knowles, Jr.
Ralph I. Knowles, Jr.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al., Plaintiffs, v. SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS

DECLARATION OF RALPH GOLDBERG

1. My name is Ralph Goldberg. I am a member of the Bar of this Court and a sole practitioner. I am a graduate of the University of Virginia and Emory School of Law (1975). I have practiced law continuously in Atlanta, Georgia since 1975, concentrating my practice on plaintiffs' civil rights and consumer litigation.

2. I have served as plaintiff's counsel in more than 100 civil rights and civil liberties cases, including successfully certified class actions, since I began practicing in Atlanta in 1975. I have also been active in the plaintiffs' civil rights bar. I have regularly participated in a variety of organizations – ranging from the American Civil Liberties Union to the National Lawyers' Guild – whose objectives are to advance the

cause of civil liberties and to recruit counsel for civil rights plaintiffs. As a result of my personal practice experience and my personal involvement in the segment of the Atlanta legal community that devotes itself to the delivery of legal services to civil rights plaintiffs over the course of the past thirty (30) years, I am intimately familiar with the Atlanta marketplace for legal services in the plaintiffs' civil rights area.

3. Over the course of the past thirty years, as the costs of federal court litigation (and litigation generally) have increased and the law under The Civil Rights Attorneys' Fees Act of 1976 (42 U.S.C. § 1988) has migrated from the Congressional purpose of fully and fairly rewarding lawyers who perform public service and undertake personal financial risk to vindicate fundamental constitutional rights to a judicially-created, bean-counting focus on lodestar compensation driven by hourly rates which do not take into account the risks of purely contingent compensation or the real financial burden lawyers experience in advancing and carrying case expenses that will be reimbursed, if at all, only at the end of the case, the financial incentives for lawyers to take civil rights cases in this marketplace have diminished. Meritorious cases which would have, in the past, been brought are regularly rejected because of the risks and costs entailed for civil rights practitioners. In my opinion and in my personal experience, the legislative purpose underlying The Civil Rights Attorneys' Fees Act of 1976 has been

undermined and, in some cases, perverted by these developments. The bottom line is that a statute enacted by Congress to limit the growth of governmental law enforcement bureaucracy by encouraging private lawyers to bring civil rights cases has, over time, discouraged the vindication of the very fundamental constitutional rights Congress said it was trying to protect.

4. To familiarize myself with the scope of this case and the work required to prosecute it, I have reviewed the docket sheet as of November 1, 2005, the Court's order published at 218 F.R.D. 277 (N.D.Ga. 2003), and the Court's Orders of July 5, 2005 and October 27, 2005 granting preliminary and final approval, respectively, for the Consent Decree at Docket #488, and the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett with accompanying accountings of billable time and expense incurred by counsel for the plaintiff class to prosecute this action.

5. The result in this case is, in my judgment and experience, exceptionally favorable to the class. I have worked on many cases seeking injunctive relief against state and local governments over the past thirty years and I have kept abreast of many others by reading published decisions. I cannot personally recall another case against the State of Georgia which was as hard-fought on both sides, which required so much time and expense over more than three years, and which yielded such a sweeping and favorable result vindicating the constitutional rights of class

members through the enhanced delivery of governmental services.

6. Much of the plaintiffs' civil rights work in the Atlanta marketplace is done by small firm and sole practitioners like myself. There are lawyers in larger firms who perform outstanding *pro bono* service, but it is generally difficult for larger firms to sue the State because of conflicts arising from government relations or public finance aspects of their practice.

7. The scope of the work required to prosecute this case and the magnitude of the investment in case expenses would have swamped the financial resources of me and the many sole and small firm civil rights practitioners I know. Therefore, but for the willingness of the Childrens Rights, Inc./Bondurant Mixson & Elmore joint venture to undertake this risky and expensive endeavor, it is my opinion and belief that this important case would not have been brought and these exceptional results would not have been achieved because of the constraints on the availability of legal services for civil rights cases in the Atlanta marketplace for legal services.

8. The amount of time devoted to the case and the amount of expense advanced to prosecute the case by class counsel are, in my opinion, reasonable, fair, and fully compensable.

9. If the Court limits fee recovery in this case to the amount derived from a lodestar calculation based on hourly rates which do not take into consideration the risks and costs of advancing and carrying nearly $1.7

million of case expenses over three year period and which do not take into consideration the risk of committing more than 29,000 hours of labor to a case for which the fee would have been zero of [sic] plaintiffs had not prevailed, the Court's decision will further chill the bringing of meritorious civil rights cases.

10. It is necessary to put this into perspective. The hours spent would require 5 attorneys working full time in the case without any other money coming into the office. I do not know how many small firms or groups of individual attorneys could have possibly devoted this much time. I have not discussed the outlay of $1.7 million. The plain fact is that such an amount would have bankrupted most of the attorneys, if not all of the attorneys, who regularly bring these kinds of cases. For example, I do not believe the local affiliate of the American Civil Liberties Union would have been able or would have dared to expend such money on the possibility of recovering the same somewhere down the road.

11. I believe a fee and expense award that fully and fairly compensates class counsel on a par with non-civil rights cases (*e.g.*, securities, antitrust, products liability, mass torts, etc.) yielding comparable results for the plaintiff class would improve the access of civil rights plaintiffs to counsel in the Atlanta market for legal services and would advance the legislative purpose for which The Civil Rights Attorneys' Fees Act of 1976 was enacted.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18 day of November, 2005.

/s/ Ralph Goldberg
Ralph Goldberg

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al., Plaintiffs, v. SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS

DECLARATION OF JOHN A. CHANDLER

1. My name is John A. Chandler. I am a member of the Bar of this Court and partner in the Atlanta office of Sutherland Asbill & Brennan, LLP, where I chair the litigation group. I am a graduate of the University of Tennessee and Vanderbilt University School of Law (1972), where I was Order of the Coif and Managing Editor of the Vanderbilt Law Review. I have practiced law continuously in Atlanta, Georgia since 1972. My practice is devoted to trial and appellate litigation. I am a past president of the Atlanta Bar Association, the Atlanta Legal Aid Society, the Atlanta Volunteer Lawyers' Foundation, and the Bleckley American Inn of Court. I was elected by Atlanta lawyers to serve on the State Bar of Georgia's Board of Governors for 20 years. I am a member of

the International Association of Defense Counsel, the Board of Visitors of the University of Tennessee's College of Arts and Sciences, a Trustee of the Lawyers Foundation of Georgia, and a Fellow of the American Bar Foundation and the American College of Trial Lawyers. I am recognized in Chambers USA's Leading Business Lawyers, The Best Lawyers in America, International Who's Who of Business Lawyers, Atlanta Magazine's "Super Lawyers", and Georgia Trend's "Legal Elite" for business litigation. I offer this declaration for use in this case by plaintiffs seeking attorneys' fee to be paid by the State of Georgia.

2. During the course of my 33 years of private practice, I have become well-acquainted with the Atlanta market for legal services, especially for services in the area of complex litigation and class actions. I am familiar with hourly billing rates and expense reimbursements currently being customarily charged and collected in the Atlanta legal market for services of this type and with alternative billing arrangements commonly and customarily employed to engage counsel for work of this type. I am also generally familiar with fee awards to successful class counsel approved by state and federal courts in Georgia in Rule 23 class actions.

3. To familiarize myself with the scope of this case and the work required to prosecute it, I have reviewed the docket sheet as of November 1, 2005, the Court's order published at 218 F.R.D. 277 (N.D.Ga. 2003), and the Court's Orders of July 5, 2005 and October 27, 2005 granting preliminary and final

approval, respectively, for the Consent Decree at Docket # 488, and the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett with accompanying accountings of billable time and expense incurred by counsel for the plaintiff class to prosecute this action.

4. Over the past three decades, I have served as lead counsel in a variety of cases, including class actions, presenting comparable factual complexity, involving comparable difficulty in terms of unsettled law, and requiring of the lawyers prosecuting this case comparable skills, judgment, professional reputation and experience. Most of my work is on behalf of civil defendants, although I have been class counsel in some cases. I am familiar with the hourly rates and expense reimbursements currently and customarily charged for the delivery of comparable legal services.

5. The Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett for the individual timekeepers who worked to prosecute this case on behalf of the plaintiffs class are reasonable and solidly within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience where: (1) the client pays such hourly charges in a 30-60 day billing cycle; (2) the client bears the out-of-pocket expense of prosecuting the case and the lawyer is not expected to advance the costs of litigation for

more than a 30-60 day billing cycle; and (3) the lawyer's recovery of fee and expense reimbursement is not contingent upon the outcome of the case.

6. In my opinion, the overall quantity of work detailed in the billing records accompanying the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett and the amount of expense incurred and advanced to prosecute this case on behalf of the plaintiff class are reasonable in light of the scope of the necessary work and the results obtained on behalf of the plaintiff class.

7. In the current Atlanta market for legal services, the Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would be generally insufficient to induce lawyers of comparable skill, judgment, professional reputation and experience to perform the necessary services to prosecute a case of this magnitude on terms where the lawyers are not paid on an ongoing basis as the work is being performed, are required to advance case expenses of $1.7 million over a three year period with no ongoing reimbursement, and the lawyers' ability to recover a fee and expense reimbursement are completely contingent on the outcome of the case. The customary compensation for legal services performed on these terms in class actions in Georgia state courts and federal courts in this district is a "percentage of the common fund/common benefit" approach, with 25%-33.3% of the common fund/common benefit, cross-checked against a multiple of the lodestar, constituting a presumptively fair fee.

8. Taking into account the work required to achieve the results obtained for the plaintiff class in this case, the level of expense and risk entailed for class counsel to prosecute this case over a three-year period with recovery of fee and investment in advanced case expenses, and fees actually awarded by courts in class actions in this district in securities, antitrust and other types of non-civil rights cases presenting comparable complexity and risk, a multiplier of no less than 1.5-2 times the lodestar amount specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would yield a reasonable fee consistent with prevailing prices in the Atlanta legal market for legal services of comparable value.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November, 2005.

/s/ John A. Chandler
John A. Chandler

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al., Plaintiffs, v. SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS

DECLARATION OF HENRY D. FELLOWS, JR.

1. My name is Henry D. Fellows, Jr. I am a member of the Bar of this Court and a name partner in Fellows, Johnson & LaBriola, LLP. I am a graduate of Bucknell University and Georgetown University Law Center (1978). Upon graduation from law school, I served as law clerk to then-Chief Judge Charles A. Moye, Jr. of this Court. I have practiced law continuously in Atlanta, Georgia since completing my clerkship in 1980. My practice is devoted to trial and appellate litigation. I currently chair the Litigation Section of the Atlanta Bar Association and serve as an arbitrator for the American Arbitration Association, the Fulton County Superior Court, and the National

Association of Securities Dealers. I was selected by peer review process for inclusion in *Georgia Trend's* 2004 Legal Elite for business litigation.

2. During the course of my 24 years of private practice, I have become well-acquainted with the Atlanta market for legal services, especially for services in the area of complex litigation and class actions. I am familiar with hourly billing rates and expense reimbursements currently being customarily charged and collected in the Atlanta legal market and with alternative billing arrangements commonly and customarily used to engage counsel in work of this type. I am also generally familiar with fee awards to successful class counsel in Rule 23 cases in this District and Circuit.

3. To familiarize myself with the scope of this case and the work required to prosecute it, I have reviewed the docket sheet as of November 1, 2005, the Court's order published at 218 F.R.D. 277 (N.D.Ga. 2003), and the Court's Orders of July 5, 2005 and October 27, 2005 granting preliminary and final approval, respectively, for the settlement embodied in the Consent Decree accompanying these orders, and the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett with accompanying accountings of billable time and expense incurred by counsel for the plaintiff class to prosecute this action.

4. Over the course of the past twenty-four years, I have served as lead counsel in a variety of cases, including class actions, presenting comparable factual

complexity, involving comparable difficulty in terms of unsettled law, and requiring of the lawyers prosecuting this case comparable skills, judgment, professional reputation and experience. I regularly represent both plaintiffs and defendants. I am familiar with the hourly rates and expense reimbursements currently and customarily charged for the delivery of comparable legal services and with alternative billing arrangements commonly and customarily employed to engage counsel for such work.

5. The Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett for the individual timekeepers who worked to prosecute this case on behalf of the plaintiffs class are reasonable and solidly within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience where: (1) the client pays such hourly charges in a 30-60 day billing cycle; (2) the client bears the burden of regularly reimbursing out-of-pocket expense of prosecuting the case as expense is incurred and the lawyer is not expected to advance the costs of litigation for more than a 30-60 day billing cycle; and (3) the lawyer's recovery of fee and expense reimbursement is not contingent upon the outcome of the case.

6. In my opinion, the overall quantity of work detailed in the billing records accompanying the Declarations of Marcia Robinson Lowry and the

amount of expense incurred and advanced to prosecute this case on behalf of the plaintiff class are reasonable in light of the scope of the necessary work and the results obtained on behalf of the plaintiff class.

7. In the current Atlanta market for legal services, the Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would be generally inadequate and insufficient to induce lawyers of comparable skill, judgment, professional reputation and experience to perform the necessary services to prosecute a case of this magnitude on terms where the lawyers are not paid on an ongoing basis as the work is being performed, are required to advance case expenses of $1.7 million over a three year period with no ongoing reimbursement, and the lawyers' ability to recover a fee and expense reimbursement are completely contingent on the outcome of the case. The customary compensation for legal services performed on these terms in Rule 23 cases in both state and federal courts in this district is a "percentage of the common fund/common benefit" approach, with 25% of the common fund/common benefit cross-checked against a multiple of the lodestar, constituting a presumptively fair fee.

8. Taking into account the work required to achieve the results obtained for the plaintiff class in this case, the level of expense and risk entailed for class counsel to prosecute this case over a three-year period with recovery of fee and investment in advanced case expenses, and fees actually awarded by courts in class actions in this district in securities, antitrust and other

types of non-civil rights cases presenting comparable complexity and risk, a multiplier of no less than 1.5-2 times the lodestar amount specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would yield a reasonable fee consistent with prevailing prices in the Atlanta legal market for legal services of comparable value.

9. Before forming Fellows, Johnson & LaBriola in 1993, I practiced at one of Atlanta's ten largest firms. Based on that experience, my management responsibilities at my law firm, and my general familiarity with the Atlanta marketplace for legal services, I can attest that it is difficult for large law firms to undertake litigation against the State of Georgia because of conflicts with government relations, public finance, and other areas of practice which could be adversely affected by suits against the State.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of November, 2005.

/s/ Henry D. Fellows, Jr.
Henry D. Fellows, Jr.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend, Linda Winn, et al., Plaintiffs, v. SONNY PERDUE, in his official capacity as Governor of the State of Georgia, et al., Defendants.	CIVIL ACTION FILE NO. 1:02-CV-1686-MHS

DECLARATION OF JAMES C. RAWLS

1. My name is James C. Rawls. I am a member of the Bar of this Court and a partner in the Atlanta office of Powell Goldstein LLP. I am a graduate of Yale Law School (1973) and have practiced law continuously in Atlanta, Georgia for the past 32 years. My practice is devoted to trial and appellate litigation, with particular focus on media and health care law. I have chaired the Atlanta College of Trial Advocacy and the Litigation Section of the Atlanta Bar Association. I have served as President of the Lamar Inn of Court. I have been selected by peer review process for inclusion in the 2006 edition of *Best Lawyers in America* for first amendment law.

2. During the course of my 32 years of private practice at one of Atlanta's large and prominent firms, I have become well-acquainted with the Atlanta market for legal services, especially for services in the area of complex litigation and class actions. I am familiar with hourly billing rates and expense reimbursements currently being customarily charged and collected in the Atlanta legal market for services of this type and with alternative billing arrangements commonly and customarily employed to engage counsel for such work.

3. To familiarize myself with the scope of this case and the work required to prosecute it, I have reviewed the docket sheet as of November 1, 2005, the Court's orders published at 218 F.R.D. 277 (N.D.Ga. 2003), the Court's Orders of July 5, 2005 and October 27, 2005 granting preliminary and final approval, respectively, for the settlement embodied in the Consent Decree accompanying these orders, and the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett with accompanying accountings of billable time and expense incurred by counsel for the plaintiff class to prosecute this action.

4. Over the course of the past three decades, I have served as lead counsel in a variety of cases, including class actions, presenting comparable factual complexity, involving comparable difficulty in terms of unsettled law, and requiring of the lawyers prosecuting the case comparable skills, judgment, professional reputation and experience. I have represented both plaintiffs and defendants. I am familiar with the

hourly rates and expense reimbursements currently and customarily charged for the delivery of comparable legal services and with alternative billing arrangements commonly and customarily used to engage counsel in work of this type. I am also generally familiar with fee awards to successful class counsel in Rule 23 cases in this District and Circuit as well as in the state courts of Georgia.

5. The Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett for the individual timekeepers who worked to prosecute this case on behalf of the plaintiffs class are reasonable and comfortably within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience where: (1) the client pays such hourly charges in a 30-60 day billing cycle; (2) the client bears the out-of-pocket expense of prosecuting the case and the lawyer is not expected to advance the costs of litigation for more than a 30-60 day billing cycle; and (3) the lawyer's recovery of fee and expense reimbursement is not contingent upon the outcome of the case.

6. In my opinion, the overall quantity of work detailed in the billing records accompanying the Declarations of Marcia Robinson Lowry and the amount of expense incurred and advanced to prosecute this case on behalf of the plaintiff class are reasonable in light of the scope of the necessary work

and the results obtained on behalf of the plaintiff class. The single exception in my opinion is for the small quantity of time charged by New York counsel for travel to and from and within Atlanta, if during that time actual legal work was not taking place. Such travel hours constitute a negligible amount of time, however, in connection with the total hours worked.

7. In the current Atlanta market for legal services, the Standard Hourly Rates specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett are not what is usually and customarily paid to lawyers who achieve a result on behalf of a plaintiff class such as the result achieved in this case. For the work and risk involved in such a representation, Standard Hourly Rates would be generally inadequate and insufficient to induce lawyers of comparable skill, judgment, professional reputation and experience to perform the necessary services to prosecute a case of this magnitude on terms where the lawyers are not paid on an ongoing basis as the work is being performed, are required to advance case expenses of $1.7 million over a three year period with no ongoing reimbursement, and the lawyers' ability to recover a fee and expense reimbursement are completely contingent on the outcome of the case. The customary compensation for legal services performed on these terms in Rule 23 cases in both state and federal courts in this district is a "percentage of the common fund/common benefit" approach, with 25% of

the common fund/common benefit constituting a presumptively fair fee.

8. Taking into account the work required to achieve what in my opinion are the excellent results obtained for the plaintiff class in this case, the level of expense and risk entailed for class counsel to prosecute this case over a three-year period with recovery of fee and investment in advanced case expenses, and fees actually awarded by courts in class actions in this district in securities, antitrust, products liability, toxic torts and other types of non-civil rights cases presenting comparable complexity and risk, a multiplier of no less than 1.5-2 times the lodestar amount specified in the Declarations of Marcia Robinson Lowry and Jeffrey O. Bramlett would yield a reasonable fee consistent with prevailing prices in the Atlanta legal market for legal services of comparable value.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of November, 2005.

/s/ James C. Rawls
James C. Rawls

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

KENNY A., by his next friend, Linda Winn; et al., Plaintiffs, vs. SONNY PERDUE, in his official capacity as Governor of the State of Georgia; et al., Defendants.	Civil Action No. 1:02-CV-1686-MHS

CONSENT DECREE

(Filed Oct. 28, 2005)

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1. INTRODUCTION

Plaintiffs brought this class action lawsuit by the filing of a complaint on June 6, 2002, in the Superior Court of Fulton County, seeking declaratory and prospective injunctive relief against Defendants based upon alleged violations of constitutional and statutory rights arising out of the operation of foster care systems in Fulton and DeKalb Counties. Plaintiffs alleged both federal and state law claims. All Defendants joined in removing the case to this Court, invoking the Court's federal question jurisdiction and denying that their operation of the Fulton and DeKalb

County foster care systems violated any constitutional or statutory guidelines.

In order to resolve all issues pending between these parties without the expense, risks, delays and uncertainties of a trial and any appeals that might follow such a trial, Plaintiffs and State Defendants agree to the terms of this Consent Decree as stated below. By entering into this Consent Decree, State Defendants do not admit to the truth or validity of any claim made against them by Plaintiffs. State Defendants also do not speak for the Georgia General Assembly, which has the power under Georgia law to determine the appropriations for the State's programs for child welfare. However, State Defendants acting under their existing authority agree that it will be a condition of their conduct of the child welfare program covered by this Consent Decree to comply with the Consent Decree. If Plaintiffs seek a judicial remedy for State Defendants' noncompliance in accordance with Section 17 of this Consent Decree, and at any stage of subsequent enforcement proceedings State Defendants assert insufficient funds as a legal excuse, Plaintiffs may move to rescind their consent to the Consent Decree. State Defendants submit to the enforcement of this Consent Decree to the full extent permitted by law.

All parties acknowledge that the Court has jurisdiction over this case and authority to enter this Consent Decree and to enforce its terms. The Court shall retain jurisdiction of this matter to enforce this Decree in accordance with its terms.

2. DEFINITIONS APPLICABLE TO CONSENT DECREE

For purposes of this Consent Decree, the following terms have the meaning indicated below.

A. "Adoptive placement" means the interval during which a child is placed with a prospective adoptive family following the signing of the appropriate adoptive placement agreement form, but before the entry of the adoption decree by the court.

B. "Business days" mean every day except Saturdays, Sundays and legal holidays, pursuant to O.C.G.A. § 1-4-1.

C. "Calendar days" mean every day including Saturdays, Sundays, and legal holidays.

D. "Child" or "children" or "class member children" or "class members" shall mean a child or children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS.

E. "Commissioner" means the Commissioner of the Georgia Department of Human Resources.

F. "Corporal punishment" means any physical punishment of a child that inflicts pain.

G. "Day" or "days" mean calendar days unless otherwise indicated.

H. "DeKalb DFCS" means the DeKalb County Department of Family and Children Services.

I. "DFCS" when used alone means State DFCS.

J. "DHHS" means the United States Department of Health and Human Services.

K. "DHR" means the Georgia Department of Human Resources.

L. "Discipline or Other Serious Foster Care Violation" means and includes those acts or situations by the caregiver that pose an immediate or potential risk to the safety or well-being of the child in care. These may include, but are not limited to, inappropriate disciplinary measures (both physical/corporal and emotional), violations of supervision or other safety requirements that pose serious risk factors to the child.

M. "EPSDT" means the Early and Periodic Screening, Diagnosis and Treatment Program for individuals under 21 years of age contained in Title XIX of the Social Security Act, as amended.

N. "Fulton DFCS" means the Fulton County Department of Family and Children Services.

O. "Georgia Health Check Program" means Georgia Medicaid's well-child or preventive health care program adopted pursuant to EPSDT, and shall contain such components as they exist in the Georgia Health Check Program as of February 1, 2005.

P. "Governor" means the Governor of the State of Georgia.

Q. "Legal guardianship" means the appointment of an individual as a legal guardian for a child as authorized by either the probate court under O.C.G.A. Title 29 or the juvenile court under O.C.G.A. Chapter 15-11,

R. "One episode of foster care" means the period of time that a child is in foster care from the date of removal from the home until the child is discharged from DFCS custody, except that a runaway does not trigger a new episode of foster care.

S. "Permanent legal custody" means custody granted in accordance with an order of the superior court or the juvenile court which places a child in the custody of an individual or individuals until the child reaches 18 years of age.

T. "Permanent placement with relatives" means placement of a child with a relative who is willing to assume long-term responsibility for the child but has reasons for not adopting the child or obtaining guardianship or permanent legal custody, and it is in the child's best interests to remain in the home of the relative rather than be considered for adoption, permanent legal custody, or guardianship by another person. In such circumstances, there shall be in place an agreement for long-term care signed by DFCS and the relative committing to the permanency and

stability of this placement unless it is necessary to disrupt the long-term placement.

U. "State DFCS" means the Division of Family and Children Services of the Georgia Department of Human Resources.

V. "State Defendants" means Defendants Sonny Perdue (in his official capacity as Governor of Georgia), the Georgia Department of Human Resources, B.J. Walker (in her official capacity as Commissioner of the Georgia Department of Human Resources), Fulton County Department of Family and Children Services, Debra Keyes (in her official capacity as Administrator of Fulton DFCS), DeKalb County Division of Family and Children Services, and Walker Solomon (in his official capacity as Director of DeKalb DFCS).

W. "Suspected abuse or neglect" means being based on reasonable cause to believe that a child may have been abused or neglected.

X. "Suspected corporal punishment" means being based on reasonable cause to believe that corporal punishment may have been used on a child.

3. PRINCIPLES

The parties to this Consent Decree agree that the following are desired principles that serve as the goals of Georgia's child welfare system and are not separately enforceable standards or provisions under

which State Defendants' conduct under the terms of this Consent Decree shall be measured.

1. Georgia's child welfare system must actively promote and support the opportunity for children to grow up within a safe, nurturing family, either their biological family or, if that is not possible, within an adoptive family.

2. When children are in foster care, all non-destructive family ties should be maintained and nurtured. If appropriate, children should be placed with relatives who are able to provide a safe, nurturing home for them. Reasonable efforts should be made to place siblings together, and relationships with relatives and siblings should be facilitated and maintained by the child welfare agency, if it is in the child's best interest to do so.

3. Foster care should be as temporary an arrangement as possible, with its goal being to provide a permanent home for the child as quickly as possible. In making the determination about what plans and services will best meet this goal, the child's interests must be paramount.

4. The state has primary responsibility for the care and protection of children who enter the foster care system. Insofar as it relies on private contractors to assist in meeting this responsibility, it should

only do so according to standards set by and rigorously monitored by the state.

5. All children in need of child welfare services should receive full and equal access to the best available services, regardless of race, religion, ethnicity, or disabilities.

6. Children in foster care placement should be in the least restrictive, most family-like setting possible, and the state should make reasonable efforts to avoid the use of non-family settings for children, particularly young children.

7. Children in foster care placement should have stable placements that meet their needs and the services necessary to address both the trauma of foster care placement and the problems surrounding their removal from their family. Children in foster care placement should have placements that meet their needs and the services necessary to promote the stability of their placements.

8. The Department of Human Resources, acting through its Commissioner, has the authority and responsibility to deliver foster care services by the means it deems appropriate consistent with the requirements of law.

4. PLANNING

A. For children entering placement after the entry of the Consent Decree

1. Within 24 hours after a child's 72-hour hearing, DFCS will make a referral to a Comprehensive Child and Family Assessment ("CCFA") provider to initiate an assessment for the child.

2. An initial Family Team Meeting will be held within 3-9 days after a child comes into foster care.

   a. Barring exigent circumstances, the Family Team Meeting participants shall include the DFCS case manager and supervisor and, if applicable, the case manager from the private contract agency which has the child in placement. DFCS will make reasonable efforts to ensure the attendance of the parents and the child (if 12 or older), and other persons significant to the family if appropriate, at the Family Team Meeting. The Family Team Meeting may also include the CCFA provider, relatives, and other persons significant to the family. A Family Team Meeting shall not be cancelled solely because of the absence of any participant as long as the required determinations can be made with the participants who are in attendance. Efforts to ensure the

attendance of participants shall be documented in the child's case file.

b. Participants at the Family Team Meeting will identify:

   i. The needs of the children and parents.

   ii. Goals for meeting those needs.

   iii. Steps for meeting the goals.

   iv. Strengths of the family members with regard to meeting the needs of the child, the child's parents, and possible placements for the child.

c. At the Family Team Meeting, DFCS will make the following determinations and shall identify and ensure the provision of necessary services to achieve such determinations:

   i. Whether the child can be safely returned home.

   ii. Whether any evaluations are necessary of the child and/or parents to ensure the development of an appropriate case plan.

   iii. If the child cannot safely be returned home, whether there is an appropriate relative with whom the child can be placed.

iv. If the child has siblings in placement and the siblings are not placed together, the identity of necessary steps to place the siblings together in accordance with Section 5.C.4.d, and necessary steps to ensure sibling visitation.

v. If the child is of school age, the identity of steps that can be taken to ensure that the child remains enrolled in school, does not miss school days extensively, and does not have to change schools if at all possible.

vi. The frequency with which visiting will take place between the child and the child's parents and significant family members.

d. If DFCS is unable to secure the parents' attendance at a meeting after the child is placed, the meeting shall nevertheless be held with the other participants, and DFCS shall make reasonable efforts to notify and review with the parents the goals outlined at the meeting, as soon thereafter as possible.

e. The outcomes of the Family Team Meeting will be reported to the Multidisciplinary Team ("MDT") for use at its meeting.

3. Within 25 days of a child's placement in foster care, an MDT Meeting will be held. Barring exigent circumstances, the MDT Meeting participants shall include the DFCS case manager and supervisor and, if applicable, the case manager from the private contract agency which has the child in placement, DFCS will make reasonable efforts to ensure the attendance of the parents and the child, if appropriate, at the MDT Meeting. The MDT Meeting may also include relatives, foster parents/placement providers, DFCS representatives, school representatives, therapists, mental health professionals, the CCFA provider, medical professionals, representatives from Public Health, and judicial representatives. An MDT Meeting shall not be cancelled solely because of the absence of any participant as long as the required determinations can be made with the participants who are in attendance. Efforts to ensure attendance of participants in the MDT shall be documented in the child's case file.

    a. The MDT will review the CCFA and make recommendations concerning the case plan and the services to be provided to the child and the family, including but not limited to the issues addressed at Family Team Meetings as described in section A.2. above, as well as (i) appropriateness

of education (including special education); (ii) the creation and appropriateness of independent living plans and services for children 14 and older; and (iii) an appropriate permanency goal for the child and the services necessary to implement that goal. The case plan will be an outgrowth of the CCFA assessment and shall be developed at the MDT meeting.

b. DFCS shall identify and ensure the provision of necessary services to achieve the determinations made at the MDT meeting, and contained in the child's case plan, unless and until altered by the Juvenile Court.

4. Within 30 days from the date of placement, a case plan with all required elements will be submitted to the Juvenile Court for approval. Case plans with all required elements and service needs shall be reviewed, updated and revised (with submission to the Juvenile Court for approval) whenever necessary, including after the MDT meeting, and at every six-month review and 12-month permanency review.

5. DFCS will include training on facilitating family team meetings as part of its pre-service training. DFCS shall have family team specialists who will attend and facilitate all family team meetings. The

Fulton County Administrator and the DeKalb County Director will designate staff to follow up on the results of all family team meetings.

B. For children who have reached their sixth month in care after the entry of the Consent Decree, and for the remaining period of time while in DFCS custody

1. Plaintiffs and State Defendants intend that within six months of the child's placement in foster care, and every six months thereafter, the child's case plan shall be reviewed by the Judicial Citizen Review Panel (JCRP) and/or the Juvenile Court, as long as the child remains in the custody of Fulton or DeKalb DFCS.

2. Plaintiffs and State Defendants desire that the persons who participate at each JCRP or Juvenile Court review shall include the parents, the child, pre-adoptive parents or relatives providing care for the child, foster parents/ placement providers, the DFCS case manager, the private provider case manager (if applicable), the case supervisor, other DFCS representatives, the CCFA providers, medical and mental health professionals, representatives from Public Health and the child's school, and other professionals having specific knowledge or information relative to the child's case. The parties further

desire that a JCRP or Juvenile Court review shall not be cancelled solely because of the absence of any participant as long as the required determinations can be made with the participants who are in attendance.

3. Plaintiffs and State Defendants intend that, at each six month case plan review, the JCRP and/or the Juvenile Court shall evaluate the following:

   a. The necessity and appropriateness of the child's placement;

   b. Whether reasonable efforts have been made to obtain permanency for the child;

   c. The degree of compliance with the specific goals and action steps set out in the case plan;

   d. Whether any progress has been made in improving the conditions that caused the child's removal from the home; and

   e. Whether changes need to be made to the case plan, including a change in the permanency goal and the projected date when permanency for the child is likely to be achieved, or changes or the addition of any services needed by the child.

4. Plaintiffs and State Defendants intend that, if the JCRP conducts the case plan

review, the panel will submit a report to the Juvenile Court, which shall include the panel's findings and recommendations, as well as the findings and recommendations of Fulton or DeKalb DFCS, along with Fulton or DeKalb DFCS' proposed revised plan for reunification or other permanency plan.

5. If the Juvenile Court conducts a review of the case plan, Fulton or DeKalb DFCS shall submit its recommendations to the court regarding a proposed revised plan for reunification or other permanency plan.

6. Following a JCRP or a Juvenile Court review, the Juvenile Court may adopt a revised case plan, taking into consideration recommendations made by Fulton or DeKalb DFCS, the JCRP, and/or the parents and enter a supplemental order in accordance with Chapter 11 of Title 15 of the Official Code of Georgia Annotated.

7. DFCS shall identify and ensure the provision of necessary services to achieve the determinations made following the actions of the Juvenile Court.

8. If deemed necessary by the case manager or case supervisor, additional meetings involving family members and professionals to discuss the implementation of the case plan may be conducted at any time.

9. If the Juvenile Court does not convene a six-month JCRP or Juvenile Court review within 45 days from the date that is six months after the last review, DHR/DFCS shall cause to be filed with the Juvenile Court a request for an immediate JCRP or Juvenile Court six-month review.

10. If the Juvenile Court does not convene a 12-month JCRP or Juvenile Court permanency review within 45 days from the date that is 12 months after the last permanency review, DHR/DFCS shall cause to be filed with the Juvenile Court a request for an immediate JCRP or Juvenile Court 12-month permanency review.

C. <u>For children who reach their thirteenth month in care after the entry of the Consent Decree and for the remaining period in time while in DFCS custody</u>

1. By the end of the 13th month after a child has been in placement, Fulton and DeKalb DFCS will forward a Permanency Report to the State Social Services Director. Prior to the forwarding of the Permanency Report, another Family Team Meeting will be convened in accordance with Paragraph A.2. of this Planning Section. This Family Team Meeting will consider the issues listed in Paragraph A.3.a. of this Section. The results of such Family Team Meeting shall be forwarded to the Social Services Director

with the Permanency Report. The Permanency Report will include a profile description of the child, the case plan, a list of impediments for achieving permanency, the CCFA, and a list of steps to be taken by the county to achieve permanency. The State Social Services Director or his designee shall review the Permanency Report within five business days of its receipt, and shall either concur with the report or refer the case for a county/state staffing.

2. A county/state staffing shall be held no later than ten days after the State Social Service Director's decision.

3. Barring exigent circumstances, the county/state staffing shall include the Fulton or DeKalb County case manager and supervisor, regional adoption coordinator, regional field specialist, county program administrator, and State Social Services Director or his designee. A county/state staffing shall not be cancelled solely because of the absence of any participant as long as the required determinations can be made with the participants who are in attendance.

4. The county/state staffing shall establish a plan to move the child toward permanency, and the State Social Services Director shall monitor the plan. DHR/DFCS shall identify and ensure the provision of necessary services to achieve

the determinations made following the county/state staffing.

5. Additional meetings shall be held at any time when deemed necessary by the State Social Services Director or by the county case manager and supervisor, and may include those participants from the initial county/state staffing, provided that at least one additional county/state staffing meeting shall be conducted by the end of the 25th month after a child remains in placement. DHR/DFCS shall identify and ensure the provision of necessary services to achieve the determinations made following any subsequent county/state staffing.

6. If the Juvenile Court orders aftercare supervision, the child's case manager shall make monthly visits with the child following discharge from foster care for the period of time specified by the Juvenile Court. DFCS will determine whether additional services are necessary to ensure the continued success of the discharge.

D. <u>For children who have already reached their 13th month in care at the time of the entry of the Consent Decree</u>

Within 120 days from the entry of the Consent Decree, Fulton and DeKalb DFCS will submit a Permanency Report for all children who have reached their 13th month in care at the time of the entry of the Consent

Decree to the State Social Service Director for a permanency review as provided in Paragraphs 1-4 of Section C, above.

E. For all children for whom adoption has been identified as the goal

1. DHR shall determine whether the foster parent(s) are appropriate potential adoptive parents and if so, determine whether they are interested in adoption, and shall make known to the foster parents the availability of adoption assistance. Foster children who meet the eligibility criteria for the program, and who are special needs children, as defined in 42 U.S.C. § 673 and DFCS policy, shall be eligible to receive an adoption assistance subsidy. If the child is eligible, DHR/DFCS will determine the child's adoption assistance subsidy based on the needs of the child. Under no circumstance shall the subsidy amount exceed the family foster care maintenance payment that the child would be eligible to receive at the time of the adoptive placement. The amount and term of the adoption assistance subsidy shall be determined prior to the signing of the adoptive placement agreement.

2. For children for whom the foster parent(s) are either inappropriate or uninterested in becoming adoptive parents, and for whom adoptive parents are not otherwise available, DFCS shall undertake

child-specific adoption recruitment. DFCS will not use as a documented compelling reason for not filing a petition for termination of parental rights the fact that there is an absence of an adoptive resource for the child.

3. Where appropriate, DFCS shall make available post-adoption services to support and stabilize adoptions for a period of at least 18 months following adoption finalization.

F. For children who reach their 18th month in care after the entry of the Consent Decree, and those who have already been in care for 18 months or more upon the entry of the Consent Decree, and for the remaining period in time while they are in DFCS custody

1. DHR/DFCS will establish a Specialized Case Manager position to focus on and to remove barriers to permanence for children in DFCS custody for 18 months or longer. The maximum caseload for any person serving in the Specialized Case Manager position will be 12.

2. Within 60 days of the entry of this Consent Decree, all children who have already reached their 18th month in care upon the date of entry of this Consent Decree shall be assigned a Specialized Case Manager as described in this Section F. Beginning 60 days after the entry of this Consent Decree

and continuing thereafter, all children that reach their 18th month in care shall be assigned a Specialized Case Manager as described in this Section F. The Specialized Case Manager, once assigned to a child, shall be the sole responsible DFCS case manager for the child. To the extent possible, the child's DFCS assignment to a particular Specialized Case Manager, once made, shall continue for the remaining period of time while the child is in DFCS custody.

3. The Specialized Case Manager provided for in this paragraph shall do the following as appropriate for the children in this Section F:

   a. Convene meetings, access funding, and make independent decisions in order:

      i. To determine the continuing appropriateness and effectiveness of the child's permanency goal and to seek court approved change of the goal if appropriate;

      ii. To determine the continuing appropriateness and effectiveness of the services being provided to the child; whether new or different services are necessary for the child; and, if so, by whom and when they will be provided;

b. Partner with the county Independent Living Coordinator to determine whether adequate independent living services and plans are being provided for all children age 14 and older;

c. Evaluate the continuing appropriateness and effectiveness of services to biological parents and relatives, and determine whether new or different services are necessary to assist the biological parents and relatives in achieving the child's permanency goal;

d. Consult with public and private professionals and take all steps necessary to ensure the provision of services leading to the child achieving permanency;

e. No sooner than 30 days prior to discharge, regardless of the discharge destination, convene a special discharge planning meeting that shall be held to ensure that appropriate services and plans are in place to ensure a successful discharge.

5. PLACEMENT

A. Identification of Needs and Placement Options

1. DFCS agrees to obtain, by means of a Request for Proposal, a qualified external expert to conduct a needs assessment

in Fulton County and DeKalb County. The needs assessment shall be based on the standards for the placement of children identified in Section 5.C. below, as applied to factual data about individual children's needs obtained in Comprehensive Child and Family Assessments and case plans pursuant to Section 4 of this Consent Decree, and as applied to other factual data relevant to determining the needs of children in the Plaintiff Class. The needs assessment shall identify what new and/or different placements and related services, if any, are needed to provide substantially for the care of the Plaintiff Class.

2. Counsel for Plaintiffs and DFCS will jointly review the responses to the Request for Proposal, which shall be drafted to accomplish the purposes of this section of the Consent Decree, and shall jointly agree to the expert. The expert shall be selected within 90 days from the entry of this Consent Decree, and shall be selected in accordance with the procurement laws of the State of Georgia.

3. The needs assessment shall be completed no later than 120 days after the expert has been retained.

4. DFCS shall provide all of the placements and related services identified in the needs assessment, except that the expert

will recommend the priority for implementing the findings of the needs assessment, based on the severity of the needs of the children whose needs are currently unmet or inadequately met. DFCS will phase in the implementation of the findings of the needs assessment, with the findings substantially implemented no later than 12 months after the completion of the needs assessment.

B. Reimbursement Rates for Placements

1. Basic foster care maintenance payments:

a. With regard to the provision of basic foster family services, including kinship care (limited to kin who are approved foster parents), effective July 1, 2005, DHR/DFCS shall set and pay the following basic foster care maintenance payments: for each child ages 0-6, $13.78; for each child ages 7-12, $15.50; and for each child age 13 and older, $17.75. DHR/DFCS shall ensure that this rate is paid to all foster parents providing basic foster family services, regardless of whether they are directly supervised by DFCS or directly supervised by private providers. These rates shall be uniform.

b. The Commissioner shall propose a periodic increase in the basic foster care maintenance payments referenced in subparagraph a., above,

effective in succeeding fiscal years, based upon discussions with affected foster parent groups and consideration of whether an increase in any amount for any age group is needed to adequately compensate for basic foster care for the relevant age groups. Class counsel shall be notified of the amount of any such increase in the basic foster care maintenance payments within 30 days of the effective date of such change in payment.

c. Beginning July 1, 2007, and continuing until the termination of this Consent Decree as provided in Section 19, if Class Counsel forms a good faith opinion that the amounts paid by DHR for basic foster care maintenance payments are insufficient to adequately compensate for foster family care, then Class Counsel may seek judicial remedies under the provisions set forth in Section 17 of this Consent Decree, and shall have the burden to show that the payment structure set by the Commissioner fails to adequately compensate for basic foster care for a particular age group or groups.

2. Within 60 days after the parties sign the Consent Decree, DHR/DFCS shall establish a Reimbursement Rate Task

Force. The Reimbursement Rate Task Force shall accept and shall not revise the base-level rate for the provision of family foster care services (including kinship care) as defined in subsection 1 above. The Reimbursement Rate Task Force shall create a rate structure based on measurable outcomes for all children in foster care (excluding basic, non-therapeutic foster family care) based on the reasonable cost for achieving these outcomes. The Reimbursement Rate Task Force shall examine the Level of Care system and make recommendations for either revising or replacing it, and shall also consider the results of various pilot programs being carried out across the state. The rate structure established by the Reimbursement Rate Task Force must comply with Title IV-E and Medicaid funding guidelines so that DHR/DFCS can draw down such funds.

3. The rate structure established by the Reimbursement Rate Task Force shall serve as the basis for performance-based contracting, and shall be phased in beginning 90 days after the Reimbursement Rate Task Force issues its findings, provided that the rates fixed by the Commissioner must be fully implemented in the contracting cycle beginning July 1, 2007.

4. Beginning in the July 1, 2006 contracting cycle and continuing thereafter,

DHR/DFCS shall ensure that all approved foster parents (regardless of whether they are supervised directly by DFCS or by private providers) receive the same reimbursement rate for a given level of service.

5. If DHR/DFCS directly supervises any approved foster homes that provide therapeutic services or operates any specialized group facilities, those approved foster parents or group facilities shall be paid at the same rate. All specialized group facilities shall be paid at the same rate for the same level of services.

6. The Reimbursement Rate Task Force shall be composed of the following members: James L. Kunz, Howard A. Peters III, and Becky Butler. The Task Force may meet when necessary in order to accomplish its duties, and shall work to finalize its recommendations in the most efficient and economical manner possible. The Reimbursement Rate Task Force shall have access to data, documents and information needed, and shall otherwise have the support needed to carry out its duties. DHR shall reimburse the members of the Task Force for approved expenses and fees incurred in performing its duties, in accordance with state regulations.

7. The Task Force shall make every effort to present its findings no later than 120 days after the entry of the Consent Decree, unless the Task Force requests and the parties consent to an extension for the presentation of findings. The Task Force shall include recommendations on the priority for implementing its findings.

C. Ensuring that the placement process secures the most appropriate placement for all children.

1. Children for whom placement has determined to be necessary shall receive an assessment of their placement needs by a qualified professional no later than 30 business days after the child enters placement. The assessment shall include the initial physical health, dental health, and mental health screenings referred to in Section 6, Paragraph A. of this Consent Decree and all other required elements.

2. As soon as the placement assessment is completed, the child's current placement shall be reevaluated to ensure that it meets the child's needs and if not a new placement shall be obtained as quickly as practicable.

3. DHR shall ensure that each county has a placement process in place, including placement specialists with knowledge of both the resources available to enable the child to remain at home safely to avoid the need for placement if possible and of the placement resources, including

the specific placement (foster home or group setting) available in a contract agency and its suitability for the particular child needing placement to reasonably ensure that each child receives the most appropriate placement for his/her individual needs.

4. Children shall be placed according to the following standards:

   a. Children shall be placed in accordance with their individual needs, as determined by the needs assessment in paragraph C.1 of this section, taking into account the child's needs to be placed as close to home and community as possible, the need to place siblings together, the DHR/DFCS preference for placement with relative resources, and the need to place children in the least restrictive, most home-like setting.

   b. Children shall be placed within their own county or within 50 miles of the home from which they were removed. This provision shall not apply if (i) the child's needs are so exceptional that they cannot be met by a family or facility within their own county or within 50 miles of the home from which they were removed, (ii) the child is placed through the ICPC consistent with

its terms, (iii) the child is appropriately placed with relatives, or (iv) the child is in an adoptive placement.

c. No child shall be placed in an emergency or temporary facility or any other foster home or group facility beds used on a temporary basis, for more than 30 days. Children shall not be placed in more than one emergency or temporary facility within one episode of foster care. No child shall spend more than 23 hours in a county DFCS office, or any facility providing intake functions, including but not limited to the current Children's Center in DeKalb County and the Fulton Family Resource Center in Fulton County.

d. Siblings who enter placement at or near the same time shall be placed together, unless doing so is harmful to one or more of the siblings, one of the siblings has such exceptional needs that can only be met in a specialized program or facility, or the size of the sibling group makes such placement impractical notwithstanding diligent efforts to place the group together. If a sibling group is separated at the initial placement, the case manager shall make immediate efforts to locate or recruit a

family in whose home the siblings can be reunited.

e. No child shall be placed in a foster home if that placement will result in more than three (3) foster children in that foster home, or a total of six (6) children in the home, including the foster family's biological and/or adopted children, without the written approval of the Social Services Director based on a reasonable determination that the home is appropriate for and can meet the needs of the additional number of children. No placement will result in more than 3 children under the age of 3 residing in a foster home. The only exception to these limits shall be circumstances in which the placement of a sibling group in a foster home with no other children in the home would exceed one or more of these limits.

f. Group Care Restrictions

The capacity of a group care setting shall include all beds on the entire grounds of the setting, and includes the total number of beds in multiple cottages.

i. No child under six years of age shall be placed in a group care setting without the express written approval of the Social

Services Director based upon his or her certification that the individual child has exceptional needs which cannot be met in any foster home placement or other facility. The certification shall describe the services which are available in the group care setting to address the child's exceptional needs. No child under six years of age who shall be certified for a group care setting under the terms in this subparagraph shall be placed in any group care setting which has a total capacity in excess of 12 children. This paragraph shall not apply to a child who is under six years of age and who is also the son or daughter of another child placed in a group care setting either prior to or after the entry of this Consent Decree. This paragraph shall not apply to a child who is under six years of age who is also the sibling of another child who has been placed in a group care setting prior to the entry of this Consent Decree, except that any such sibling under the age of six shall be moved to a foster home placement within 12 months of the entry of this Consent Decree unless doing so

would not be in the best interest of the children in question.

ii. No child between the ages of six and 12 years of age shall be placed in a group care setting without the express written approval of the Social Services Director based upon his or her certification and specific findings that the individual child has needs which can be met in the particular group care setting and that the particular group setting is the least restrictive placement that can meet such needs. The certification shall describe the services which are available in the group care setting to address the child's needs. No child between the ages of six and 12 years of age who shall be certified for a group care setting under the terms in this subparagraph shall be placed in any group care setting which has a total capacity in excess of 12 children. This paragraph shall not apply to a child between the ages of six and 12 years who is also the sibling of another child who has been placed in a group care setting prior to the entry of this Consent Decree, except that any such sibling between the ages of

six and 12 years shall be moved to a foster home placement within 12 months of the entry of this Consent Decree unless doing so would not be in the best interest of the children in question. For any other children between the ages of six and 12 who were placed in a group care setting prior to the entry of this Consent Decree, DHR/DFCS shall have 12 months from the entry of this Consent Decree to move such children to a non-group care setting unless doing so would not be in the best interest of the child or children in question.

iii. Children who are at least 12 years of age and older may be placed in a group care setting without any of the restrictions contained in paragraphs i. or ii., above.

g. Children for whom the permanency goal is adoption should, whenever possible, be placed with a family in which adoption is a possibility.

h. Race and/or ethnicity and/or religion shall not be the basis for a delay or denial in the placement of a child, either with regard to matching the child with a foster or adoptive family

or with regard to placing a child in a group facility. Race and/or ethnicity shall otherwise be appropriate considerations in evaluating the best interest of an individual child to be matched with a particular family. DHR shall not contract with any program or private agency that gives preference in its placement practices by race, ethnicity, or religion, but may utilize its authority to contract with private providers to ensure that the pool of available foster and adoptive families reflects and meets the needs of children for whom foster and adoptive placements are needed, including placements for children for whom placement resources are scarce or unavailable.

i. DHR shall only contract for placements or services with licensed contractors or subcontractors. No child shall be placed in an unlicensed facility.

j. DFCS will ensure the basic physical needs of food, clothing and shelter for children in foster care. At the time of placement or at any placement move, DFCS will review the child's clothing needs to assess appropriateness and take necessary steps to ensure that the child has appropriate clothing.

5. DFCS shall take steps to minimize any trauma which may be experienced by a child which is associated with either a change in placement or in case managers.

6. DHR/DFCS shall take appropriate steps to ensure that foster children placed in foster family homes, whether directly supervised by DHR/DFCS or private providers, receive adequate supports, including the following:

   a. DHR/DFCS shall ensure that before a child is placed in any approved foster family home, the foster parents have received uniform and appropriate pre-service training;

   b. DHR/DFCS shall ensure that all approved foster parents with whom foster children are placed shall receive uniform and appropriate ongoing training, and that they are reasonably informed of any changes in laws or DHR/DFCS policies that affect foster parents;

   c. DHR/DFCS shall ensure that all foster parents (including kinship providers) with whom foster children are placed can contact DHR/DFCS and receive information 24 hours a day, 7 days a week, so that questions or concerns can be timely and appropriately addressed;

d. DHR/DFCS shall ensure that available information concerning a specific foster child, including family history, medical, dental, mental health and educational information, and any other information that is relevant to the child's safety and well-being, is provided to approved foster parents, before the child is placed in the home, and that complete and accurate updated information is provided to the approved foster parents after the child is placed as such information becomes available.

D. Visitation

The frequency and intensity of in-placement visits and other visits with a child shall be determined by the individual needs of the child. An in-placement visit refers to a private face-to-face visit with the child *in the child's home/placement,* in order to monitor and document the child's adjustment to the placement, the appropriateness of the placement to meet the child's needs, the receipt of appropriate treatment and services by the child, the child's safety, and service goals. A visit refers to a face-to-face visit with the child, in order to monitor and document the child's adjustment to the placement, the appropriateness of the placement to meet the child's needs, the receipt of appropriate treatment and services by the child, the child's safety, and service goals. The following minimum in-placement visits and other visits shall apply:

1. For all children in placements other than adoptive placements:

   a. For the first eight weeks after an initial placement or upon any change in placement, there shall be at least: (a) one in-placement visit during the first week of the placement; (b) one in-placement visit between the third and the eighth week of the placement; and (c) six additional visits during the eight week period.

   b. Thereafter, there shall be at least one in-placement visit per month and one additional private visit per month.

2. For all children in adoptive placements, there shall be (a) one in-placement visit the day after the child is placed; and (b) at least one in-placement visit per month after the placement but before the adoption petition is filed; and (c) at least one in-placement visit per quarter after the adoption petition is filed.

6. HEALTH SERVICES TO CHILDREN

A. Initial Screenings and Follow-Up Treatment

1. Physical Health Screening: All children shall receive a medical screening within ten days of placement in compliance with EPSDT standards, including at a minimum, the components identified in the Georgia Health Check Program, and shall receive any and all treatment as directed by the child's assessing physician.

2. Dental Health Screening: All children shall receive a dental screening within ten days of placement in compliance with EPSDT standards, including at a minimum, the components identified in the Georgia Health Check Program, and shall receive any and all treatment as directed by the child's assessing dentist.

3. Mental Health: All children four years of age and older shall receive a mental health screening conducted by a licensed mental health professional and completed within 30 days of placement in compliance with EPSDT standards, including at a minimum, the components identified in the Georgia Health Check Program, and shall receive any and all treatment as directed by the child's assessing professional. The mental health screening shall be commenced prior to the MDT meeting provided in Section 4.A.3. of this Consent Decree. All children under four years of age shall receive a developmental assessment conducted by a licensed professional and completed within 30 days of placement in compliance with EPSDT standards, including at a minimum, the components identified in the Georgia Health Check Program, and shall receive any and all treatment as directed by the child's assessing professional. The developmental assessment shall be commenced prior to the MDT meeting provided in Section 4.A.3. of this Consent Decree.

B. Periodic Health Screenings and Treatment

1. Ages zero through six months: All children between the ages of zero to six months shall receive no less than three periodic EPSDT/Georgia Health Check Program health screenings.

2. Ages six months through 18 months: All children between the ages of six months through 18 months shall receive no less than four periodic EPSDT/Georgia Health Check Program health screenings performed at approximate three month intervals.

3. Ages 18 months through five years: All children between the ages of 18 months through five years shall receive no less than one periodic EPSDT/Georgia Health Check Program health screening performed every six months.

4. Ages six years and over: All children of six years of age and older shall receive no less than one periodic EPSDT/Georgia Health Check Program health screening performed every year.

5. All children shall receive any follow-up treatment or care as directed by the physician who administered the periodic EPSDT/Georgia Health Check Program health screening.

6. Every child shall receive an EPSDT/ Georgia Health Cheek Program health

screening within ten days of receiving a final discharge from placement.

7. Children's health needs, including dental and mental health needs, between periodic screenings shall be met as provided by EPSDT.

8. All children age 3 and over shall receive at least one annual dental screening in compliance with EPSDT standards, including at a minimum, the components identified in the EPSDT/Georgia Health Check Program, and shall receive any and all treatment as directed by the child's assessing dentist.

C. All medication prescribed for a child will be administered as ordered in such prescription(s), only designated, authorized, and appropriately trained personnel shall administer the taking of any prescribed medication for children in any non-foster family care placement.

7. SINGLE STATEWIDE AUTOMATED CHILD WELFARE INFORMATION SYSTEM

A. State Defendants shall have a fully implemented, single statewide automated child welfare information system ("SACWIS") containing at a minimum:

1. The system shall have the functionalities as identified and described in Appendix "A" hereto;

2. The system shall have the data integrity and quality assurance processes as identified and described in Appendix "B" hereto; and

3. The system shall have the security and data recording and recovery elements as identified and described in 45 CFR Part 95, Subpart F, § 95.621.

B. The date certain for full implementation shall be set forth in a contract with a selected vendor, with the vendor selected and the contract effective on or before December 31, 2005. The date for full implementation shall be added to this Consent Decree after the contract is executed.

C. Both leading up to and subsequent to the full implementation of a single statewide automated child welfare information system, State Defendants shall at all times satisfy all federal reporting requirements and shall maintain data integrity and accuracy on a continuous basis.

8. CASELOADS

A. DFCS will phase in a reduction in its caseload in Fulton and DeKalb Counties for its CPS investigators, ongoing case managers, placement case managers, and adoption case managers over a two year period as provided below. In the event that a worker has a mixed caseload, the caseload shall be weighted to reflect the standards in this section.

1. By the end of the second reporting period, the following caseloads will exist in Fulton and DeKalb County DFCS:

    a. No CPS case manager shall have more than 20 cases.

    b. No ongoing case manager shall have more than 20 cases.

    c. No placement case manager shall have more than 25 cases.

    d. No adoption case manager shall have more than 22 cases.

2. By the end of the fourth reporting period and continuing thereafter, the following caseloads will exist in Fulton and DeKalb County DFCS:

    a. No CPS case manager shall have more than 12 cases.

    b. No ongoing case manager shall have more than 17 cases.

    c. No placement case manager shall have more than 15 cases.

    d. No adoption case manager shall have more than 16 cases.

B. DFCS will phase in a reduction in the ratio of supervisors to case managers in Fulton and DeKalb County over a two-year period as provided below.

1. By the end of the second reporting period, no supervisor shall supervise more

than six case managers at any one time in Fulton and DeKalb County DFCS.

2. By the end of the fourth reporting period and continuing thereafter, no supervisor shall supervise more than five case managers at any one time in Fulton and DeKalb County DFCS.

C. DFCS will phase in elimination in the employment or utilization of temporary personnel ("PRNs") as case managers in Fulton and DeKalb County over a one-year period as provided below.

1. From the period beginning six months from the entry of the Consent Decree up through the period ending one year from the entry of the Consent Decree, PRNs shall comprise no more than 11% of the total allocation of social services case managers for Fulton and DeKalb County DFCS, respectively.

2. From the period beginning one year from the entry of the Consent Decree and continuing thereafter, no PRNs shall be employed or utilized as case managers in Fulton and DeKalb County DFCS.

D. The caseloads for Specialized Case Managers shall be governed by Section 4.F. of this Consent Decree.

9. SUPERVISION OF CONTRACT AGENCIES

A. DHR shall require, and shall take appropriate steps to ensure, that all child-caring institutions or child-placing agencies that provide placements and services to class members meet all applicable terms of this Consent Decree.

B. This Section 9 applies to any contract for the provision of placements and services to class members into which DHR enters during the contract cycle beginning July 1, 2005, or as soon as practicable following the entry of the Consent Decree. Into any such contract, which shall be annual performance-based contracts, DHR will incorporate all applicable requirements of this Consent Decree, but will do so without reference to the Consent Decree itself. DHR will also specify in any such contract that the suspected abuse or neglect of any class member while receiving such placements or services shall be reported to DHR for investigation, that all placement providers for foster children in DFCS custody are prohibited from using or authorizing the use of corporal punishment, and that any suspected corporal punishment while in that provider's care shall be reported to DHR for screening, assessment or investigation as necessary. The findings of investigations of suspected abuse or neglect, or of the assessment or investigation of suspected corporal punishment, shall be included in the criteria that DHR uses in determining whether to renew the license of a contract

agency. With respect to contract agencies' contractual violations, DHR may use such contractual remedies as provided by the contract and by applicable Georgia statutes and Rules and Regulations. The failure of a contract agency to report suspected abuse or neglect of a child to DHR/DFCS shall result in appropriate process being issued in accordance with applicable statutes, rules and regulations for immediate termination of the contract or placement of the provider on probation, and a repeated failure within one year shall result in termination of the contract.

C. DHR shall ensure that all child-caring institutions or child-placing agencies that provide placements and services to class members report to DHR accurate data on at least a bi-annual (6 months) basis so that their compliance with the terms of this Consent Decree can be measured.

D. DHR, through its Office of Regulatory Services ("ORS"), shall conduct licensing evaluations of all child-caring institutions and child-placing agencies providing placements and services to class members, to ensure, among other things, the safety and well being of class members and to ensure that the contract agency is complying with the applicable terms of this Consent Decree. As part of such evaluations, ORS shall ensure that each child-caring institution and child-placing agency shall receive at least one unannounced inspection a year to review all

relevant aspects of the agency/institution's operations, and that, in addition, 5% of family foster homes or a total of 10 homes (whichever is greater, or all homes for agencies providing less than 10 homes in total) provided by each child-placing agency shall receive such an unannounced annual inspection to review all relevant aspects of the agency/institution's operations. ORS shall prepare a written report after each visit detailing its findings, and shall provide follow-up visits or monitoring if deemed necessary. With respect to license-holders' deficiencies, ORS may use such remedies as are provided by applicable Georgia statutes and Rules and Regulations.

10. TRAINING

A. No case manager shall assume responsibility for a CPS, ongoing, foster care or adoption case, until after completing pre-service training as specified below and after passing an appropriate skills-based competency test, as determined by DHR/DFCS. No case manager supervisor shall assume supervisory responsibility until after completing pre-service training as specified below and after passing an appropriate skills-based competency test, as determined by DHR/DFCS.

B. DFCS shall have a full time Education and Training Services Section headed by a manager of Education and Training with appropriate qualifications, as determined by DHR/DFCS.

1. The training unit shall provide comprehensive and appropriate child welfare pre-service training to ensure that all case managers and supervisors responsible for children will have training to permit them to comply with the terms of this Consent Decree, law, DFCS policy and reasonable professional standards, as determined by DHR/DFCS.

2. DHR/DFCS management shall determine, on an annual basis, those DFCS workers in need of re-training, as indicated by workers' failure to ensure that the cases for which they are responsible comply with the terms of this Consent Decree, law, DFCS policy and reasonable professional standards, as determined by DHR/DFCS, and shall ensure that additional training is provided to them.

3. All new case managers shall have a minimum of 160 hours of pre-service training, including instructional training and supervised field training, unless waived by the Director of Education and Training Services in accordance with the Office of Child Protective Services New Case Manager Training Waiver Guidelines issued April 1, 2005, or comparable

guidelines. All case manager supervisors shall receive a minimum of 40 hours of in-service training that is directed specifically at the supervision of child welfare workers, prior to receiving any supervisory duties. All case managers shall receive a minimum of 20 hours of ongoing training each year. All case managers with supervisory responsibility shall receive a minimum of 20 hours of in-service training each year.

4. Private provider agencies with whom DFCS contracts for the provision of placements for children in DFCS custody shall be required, through contract provisions, to certify that employees providing case management or supervisory services for DFCS have met the following criteria:

   a. Have an undergraduate degree from an accredited college or university;

   b. Have completed a training curriculum consisting of at least 160 hours of classroom, internet and/or supervised field instruction, unless waived by the Director of Education and Training Section in accordance with the Office of Child Protective Services New Case Manager Training Waiver Guidelines issued April 1, 2005, or comparable guidelines. The curriculum shall be approved by DHR/DFCS to ensure that the general

content areas are appropriate to the work being performed. Where case work activities mirror those of DFCS case managers or supervisors, the curriculum shall be comparable to DHR/DFCS' pre-service and in-service training;

c. Have a passing score on the case manager and/or supervisor online assessment required for new worker certification as of July 1, 2005; and

d. Have 20 hours of job related ongoing professional development annually.

C. All case manager supervisors employed after the entry of this Consent Decree shall have a minimum of a bachelor's degree in social work, and at least two years of experience as a case manager in social services.

11. FOSTER PARENT SCREENING, LICENSING AND TRAINING

A. All paragraphs in this section shall apply to all class members, whether they are in placements supervised directly by DHR/DFCS, or in placements supervised directly or provided by private contract agencies.

B. DHR/DFCS shall develop and maintain uniform standards for the approval, and re-approval, of all foster and pre-adoptive families with whom class members may be placed. These standards shall comply with federal law.

C. The actual processes for approval and re-approval of all foster and pre-adoptive families/ parents with whom class members may be placed, shall be developed and carried out by DFCS in conjunction with ORS.

D. DHR/DFCS shall require uniform training of all foster and pre-adoptive families/parents with whom class members may be placed. Uniform training for all foster parents shall be required prior to the placement of any children with a foster or pre-adoptive family. All foster parents shall also be required to complete annual training, as part of an annual re-approval process.

E. Within 90 days of the entry of this Consent Decree, DHR/DFCS shall have an automated information system that can provide the following:

1. For every foster and pre-adoptive family/ parents with whom class members may be placed, the name, address, phone number, and, if supervised directly by a private provider, the name and address of the private provider.

2. For every foster and pre-adoptive family/ parents with whom class members may be placed, a list of all foster children in the home, the number and age of any other children in the home, any other adults who are providing direct care or supervision for class members in the home, and the county DFCS office with custody of each foster child.

3. For every foster or pre-adoptive family/ parents with whom class members may be placed, the approval or re-approval status of the home.

4. For every foster or pre-adoptive family/ parents with whom class members may be placed, a complete history beginning in January 1, 2002 and going forward, of any reports of abuse or neglect and any substantiated reports of abuse or neglect.

5. DHR/DFCS shall consider the information above before a child is placed with any foster or pre-adoptive family/parents, and before any approval, or re-approval is granted.

F. DHR/DFCS shall not allow any foster or pre-adoptive family/parents to be given approval or re-approval, and shall not allow any class members to be placed or to continue to be placed with such foster or pre-adoptive family/ parents, if that same foster or pre-adoptive family/parents has been found to be the perpetrator of substantiated abuse or neglect, or has had their home closed as the result of a policy violation that threatened the safety of a child, has had their home closed as a result of two violations of the corporal punishment policy, or has had their home closed as a result of a single violation of the corporal punishment policy where the family was not amenable to change, correction, or DFCS intervention. DHR/DFCS shall be able to

identify if (a) foster or pre-adoptive family/ parents were the perpetrators of substantiated abuse or neglect, or had their homes closed, while being supervised by a private contract agency, and they subsequently seek to become approved or re-approved with a different private contract agency or directly as a DFCS supervised foster or pre-adoptive family/parents; or (b) foster or pre-adoptive family/parents were the perpetrators of substantiated abuse or neglect, or had their homes closed, while being supervised directly by DFCS, and they subsequently seek to become approved or re-approved with a private contract agency.

G. DHR/DFCS shall also maintain the following information in accessible paper file form:

1. For every foster or pre-adoptive family/ parents with whom class members may be placed, the approval or re-approval status of the home, and for any foster or pre-adoptive family/parents not in full approval or re-approval status, the reasons for lack of full approval or re-approval status.

2. For every foster or pre-adoptive family/ parents with whom class members may be placed, a complete history for the prior 5 years of any reports of possible abuse or neglect and any substantiated reports of abuse or neglect (and the nature of the report and the nature of the substantiation), home closings (and

the reasons therefore) or refusals to place further children in the home (and reasons therefore), or other corrective actions or disciplinary actions ever taken against the foster or pre-adoptive family/ parents (and reasons therefore).

3. DHR/DFCS shall consider the information above before a child is placed with any foster or pre-adoptive family/parents, and before any approval, or re-approval is granted.

12. ABUSE IN CARE INVESTIGATIONS

A. All referrals of reports of suspected abuse or neglect of children in foster care shall be investigated by DFCS child protective services staff in the manner and within the time frame provided by law and DFCS policy.

B. All referrals of suspected abuse or neglect of foster children in institutional, group, residential or foster family homes provided or directly supervised by private providers shall also be referred to and reviewed by the Office of Regulatory Services and the Social Services Treatment Services Unit. The purpose of this review is to determine whether a pattern of abuse or neglect exists within the institutional, group, residential, foster family homes or private provider agency that contributed to the abuse or neglect; whether the contract should be terminated; whether particular homes or facilities should be closed;

and what other steps are necessary to safeguard the safety and well-being of children.

C. Corporal Punishment.

1. DHR/DFCS shall continue to require that foster parents and other placement resources for children in the custody of DHR shall not use corporal punishment of children in their care, nor shall they authorize or permit any other individual or agency to administer corporal punishment.

2. When a report of suspected corporal punishment of a foster child in DHR/DFCS custody is received, the allegations must be immediately screened by the Child Protective Services intake unit or the Regional Field Program Specialist. Such personnel shall have appropriate training in child protective services including the screening of reports of potential corporal punishment and abuse/neglect and in discerning the difference between them. No such personnel shall also have any responsibility for the selection, recruitment, approval or reapproval, retention or matching of foster, adoptive or other placement options for foster children. If there is reasonable cause to believe that abuse or neglect occurred, the report of corporal punishment must be treated as an abuse referral and forwarded immediately to the Child Protective Services Supervisor

who will follow policy requirements for abuse or neglect reports. All reports of suspected corporal punishment in child caring institutions shall be treated as an abuse referral and forwarded immediately to the Child Protective Services Supervisor who will follow policy requirements for abuse or neglect reports.

3. If suspected corporal punishment in DHR/ DFCS custody does not result in an abuse referral, the following provisions shall apply to assessments of foster homes:

   a. Assessment:

      i. The assessment of suspected corporal punishment shall be conducted in the manner and within the time frames required by law and DFCS policy.

      ii. No additional placements may be made in the foster home until the investigation is complete.

   b. Assessment and Conclusions:

      i. If the allegation of suspected corporal punishment is supported by the assessment findings, the home must be closed if:

         a. the violation had direct impact on the safety and well being of the child or posed a serious risk factor for the child in the home;

b. the violation is the second Discipline or Other Serious Foster Care Violation; or

c. the family is not amenable to change, correction or DFCS intervention.

ii. If the allegation that the discipline policy has been violated is supported and none of the conditions listed in i. above is present, then the home may remain open and a corrective action plan must be developed, agreed upon, and signed by all participants. DHR/DFCS shall ensure that the corrective action plan is appropriately monitored and enforced. The county director may close the foster home in his or her discretion. In deciding whether to close the foster home, the county director should consider: the severity of the incident, the pattern of behavior and history of the foster parents, the identified needs of the child, the willingness of the foster parents to look at alternative approaches to discipline, and the quality of the relationship between the child and foster parent.

4. Office of Regulatory Service Regulation 290-2-5.18 prohibits the use of corporal punishment in child caring institutions. Violation of this regulation shall be enforced by the Office of Regulatory Services and shall be punishable by fine, probation, suspension or revocation of license and other sanctions under the Rules and Regulation of the Department of Human Resources.

13. CORRECTIVE ACTIONS

A. Within 60 days of the final entry of this Consent Decree, DHR/DFCS shall identify all class member children in custody for 12 months or more who have not had a medical examination within the prior 12 months, and all foster children in custody for more than 30 days and less than 12 months who have not have a medical examination since their most recent entry into custody. The identified children shall be provided with a medical examination and treatment as set forth in Section 6 of this Consent Decree concerning Health Services to Children by the end of the first reporting period.

B. Within 60 days of the final entry of this Consent Decree, DHR/DFCS shall identify all foster care placements (foster family homes or non-foster family homes, DFCS-supervised, or private provider-supervised) in which one or more class member children have been placed in the past 6 months, for

which placements there have been 2 or more substantiated reports of abuse or neglect in the past 18 months. For each placement identified, by the end of the first reporting period, DHR/ DFCS shall conduct an unannounced inspection of the home to determine if there are any risks to the health, safety and well-being of children living in such placements, and shall take all appropriate actions.

14. MAXIMIZATION OF FEDERAL FUNDING

DHR/DFCS shall maximize funds available to it through Title IV-B and IV-E of the Social Security Act. DHR/DFCS shall establish baselines for present levels of state and federal funding in order to identify increases in federal funding. The parties intend that any increases achieved in federal funding shall not supplant state funds for foster care services. DHR/ DFCS shall demonstrate to the reasonable satisfaction of the Accountability Agents that DHR/DFCS has an appropriate mechanism in place for reporting the budgeting of both federal and state dollars. Plaintiffs' agreement herein is premised upon the good faith representation by DHR and the Governor that that their policy will be to urge the General Assembly that state dollars committed to DHR/DFCS for the provision of services and resources to benefit children in the class shall not be decreased from current levels if efforts to maximize federal dollars result in additional federal funding.

15. OUTCOME MEASURES

State Defendants shall meet the following Outcome Measures in the Reporting Periods specified. Performance percentages required "by the end of" a Reporting Period will be measured during the immediately subsequent Reporting Period. Each Reporting Period shall be six months. State Defendants will comply with each Outcome Measure according to its terms for the duration provided for Outcome Measures in Section 19 of this Consent Decree.

1. Commencement of CPS investigations concerning foster children: By the end of the first reporting period, at least 95% of all investigations of reports of abuse or neglect of foster children shall be commenced, in accordance with Section 2106 of the Social Services Manual, within 24 hours of receipt of the report.

2. Completion of CPS investigations concerning foster children: By the end of the first reporting period, at least 95% of all investigations of reported abuse or neglect of foster children shall be completed, in accordance with Section 2106 of the Social Services Manual, within 30 days of receipt of the report.

3. Contact with the alleged victim: By the end of the first reporting period, at least 99% of all investigations of reported abuse or neglect of foster children during the reporting period shall include timely face-to-face, private contact with the

alleged victim, including face-to-face, private contact with a child who is non-verbal due to age or for any other reason.

4. Re-entry into care: By the end of the second reporting period, no more than 8.6% of all foster children entering custody shall have re-entered care within 12 months of the prior placement episode.

5. Maltreatment in care: By the end of the first reporting period, no more than 1.27% of all children in foster care shall be the victim of substantiated maltreatment while in foster care. By the end of the second reporting period, no more than .94% of all children in foster care shall be the victim of substantiated maltreatment while in foster care. By the end of the fourth reporting period, no more than .57% of all children in foster care shall be the victim of substantiated maltreatment while in foster care.

6. By the end of the second reporting period, 90% of all foster homes will not have an incident of corporal punishment within the previous six months. By the end of the third reporting period, 98% of all foster homes will not have an incident of corporal punishment within the previous 12 months.

7. Search for relatives: By the end of the second reporting period, at least 70% of

all foster children entering care shall have had a diligent search for parents and relatives undertaken and documented within 90 days of entering foster care. By the end of the fourth reporting period, at least 95% of all foster children entering care shall have had a diligent search for parents and relatives undertaken and documented within 60 days of entering foster care.

8. (a) Of all children entering custody following the entry of the Consent Decree, at least 40% shall have had one of the following permanency outcomes within 12 months or less after entering custody: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. Performance on this measure shall be taken on the first day after the end of the second reporting period, and shall be taken at the end of subsequent reporting periods, as necessary. For example, to sustain compliance at the end of the third reporting period, of all children who entered custody after the entry of the Consent Decree, at least 40% shall have had one of the following permanency outcomes within 12 months or less after entering custody: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. Performance on this measure shall be taken on the first day

after the end of the third reporting period.

(b) Of all children entering custody following the entry of the Consent Decree, at least 74%: (1) shall have had one of the following permanency outcomes within 12 months or less after entering custody: reunification or permanent placement with relatives; or (2) shall have had one of the following permanency outcomes within 24 months or less after entering custody: adoption, permanent legal custody or guardianship. Performance on this measure shall be taken on the first day after the end of the fourth reporting period, and shall be taken at the end of subsequent reporting periods, as necessary. For example, to sustain compliance at the end of the fifth reporting period, of all children who entered custody after the entry of the Consent Decree, at least 74% shall have had one of the permanency outcomes within the types of permanent placement and time frames as listed in (1) or (2) above. Performance on this measure shall be taken on the first day after the end of the fifth reporting period.

9. Children in custody for up to 24 months and still in custody upon entry of the Consent Decree (children in the "24 month backlog pool"): For all children in the 24 month backlog pool, by the end of the second reporting period at least 35%

shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For children in the 24-month backlog pool who remain in custody at the end of the second reporting period, by the end of the third reporting period at least 40% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For children in the 24-month backlog pool who remain in custody at the end of the third reporting period, by the end of the fourth reporting period at least 40% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship.

10. Children in custody for more than 24 months and still in custody upon entry of Consent Decree (children in the "over 24 month backlog pool"): For all children in the over 24 month backlog pool, by the end of the second reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For all children in the over 24 month backlog pool who remain in custody by the end of the second reporting period, by the end of the third reporting period at least 35% shall have

one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For all children in the over 24 month backlog pool who remain in custody by the end of the third reporting period, by the end of the fourth reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship.

11. By the end of the second reporting period, for all children whose parental rights have been terminated or released during the reporting period, 80% will have their adoptions or legal guardianships finalized within 12 months of final termination or release of parental rights.

12. For children whose parental rights have been terminated or released and the child has an identified adoptive or legal guardian resource at the time of the entry of the Consent Decree, 90% shall have had their adoptions or legal guardianships finalized within six months after the entry of the Consent Decree.

13. For all children for whom parental rights have been terminated or released at the time of entry of the Consent Decree, and the child does not have an identified adoptive resource, 95% shall

have been registered on national, regional, and local adoption exchanges, and have an individualized adoption recruitment plan or plan for legal guardianship within 60 days of the entry of the Consent Decree.

14. Adoption disruptions: No more than 5% of adoptions finalized during the reporting period shall disrupt within the 12 months subsequent to the reporting period.

15. Permanency efforts (15/22): By the end of the second reporting period, at least 80% of all foster children who reached the point of being in state custody for 15 of the prior 22 months, shall have had either (1) a petition for the termination of parental rights filed as to both parents or legal caregivers as applicable OR (2) documented compelling reasons in the child's case record why termination of parental rights should not be filed.

By the end of the fourth reporting period, at least 95% of all foster children who reached the point of being in state custody for 15 of the prior 22 months, shall have had either (1) a petition for the termination of parental rights filed as to both parents or legal caregivers as applicable OR (2) documented compelling reasons in the child's case record why termination of parental rights should not be filed.

16. Sibling Placement: By the end of the second reporting period, at least 70% of

all foster children who entered foster care during the reporting period along with one or more siblings shall be placed with all of their siblings. By the end of the fourth reporting period, at least 80% of all foster children who entered foster care during the reporting period along with one or more siblings shall be placed with all of their siblings.

17. Multiple Placement Moves: By the end of the second reporting period, at least 86.7% of all children in care shall have had 2 or fewer moves during the prior 12 months in custody. By the end of the fourth reporting period, at least 95% of all children in care shall have had 2 or fewer moves during the prior 12 months in custody.

18. Caseworker continuity: By the end of the second reporting period, at least 90% of all children in care at a point in time during the reporting period shall have had 2 or fewer DFCS placement case managers during the prior 12 months in custody. This measure shall not apply to cases that are transferred to an adoption worker or to a Specialized Case Manager as referenced in Section 4.F.; case managers who have died, been terminated, or transferred to another county; or case managers who have covered a case during another case manager's sick or maternity leave.

19. Placement within county: By the end of the second reporting period, at least 70% of all children in care shall be placed in their own county (the county from which they were removed) or within a 50 mile radius of the home from which they were removed, subject to the exceptions in Paragraph 5.C.4.b(ii) and (iii) above. By the end of the third reporting period, at least 80% of all children at a point in time during the reporting period shall be placed in their own county (the county from which they were removed) or within a 50 mile radius of the home from which they were removed, subject to the exceptions in Paragraph 5.C.4.b(ii) and (iii) above. By the end of the fourth reporting period, at least 90% of all children at a point in time during the reporting period shall be placed in their own county (the county from which they were removed) or within a 50 mile radius of the home from which they were removed, subject to the exceptions in Paragraph 5.C.4.b(ii) and (iii) above.

20. Visitation (worker-child): By the end of the second reporting period, at least 95% of children in care at a point in time during the reporting period shall have had at least one in-placement visit and one other visit, as defined in Section 5.D, each month by their case manager during the prior 12 months in custody.

21. Visitation (parent-child when goal is reunification): By the end of the third reporting period, 75% of the children with a goal of reunification shall have had appropriate visitation with their parents to progress toward reunification. By the end of the fourth reporting period, 85% of the children with a goal of reunification shall have had appropriate visitation with their parents to progress toward reunification.

22. Visitation (worker-caregiver): By the end of the second reporting period, at least 90% of all children in care at a point in time during the reporting period shall have had visits between their DFCS placement case manager and their foster parent, group care, institutional or other caretaker at least one time each month during the prior 12 months in custody.

23. Visitation (between siblings): By the end of the second reporting period, at least 80% of children in the Class at a point in time during the reporting period who have one or more siblings in custody with whom they are not placed shall have had visits with their siblings at least one time each month during the prior 12 months in custody, unless the visit is harmful to one or more of the siblings, the sibling is placed out of state in compliance with ICPC, or the distance between the children's placements is

more than 50 miles and the child is placed with a relative.

24. Achievement Measures on Discharge: A baseline measure shall be developed that shows the percentage of children discharged from foster care at age 18 or older during the 12 months prior to the entry of the consent decree who have graduated from high school or earned a GED. By the end of the second reporting period, that percentage shall increase by 10 percentage points. By the end of the fourth reporting period, that percentage shall increase by an additional 10 percentage points.

25. Placements not in full approval status: By the end of the first reporting period, at least 85% of all foster children in custody at a point in time during the reporting period shall be in placements that are in full approval and/or licensure status. By the end of the second reporting period, at least 95% of all foster children in custody at a point in time during the reporting period shall be in placements that are in full approval and/or licensure status. By the end of the fourth reporting period, at least 98% of all foster children in custody at a point in time during the reporting period shall be in placements that are in full approval and/or licensure status.

26. Case files not containing required court ordered language: By the end of the

second reporting period, at least 85% of foster children in custody at a point in time during the reporting period shall have all applicable language in court orders necessary to assess qualification for federal funding under Title IV-E of the Social Security Act. By the end of the fourth reporting period, at least 95% of foster children in custody at a point in time during the reporting period shall have all applicable language in court orders necessary to assess qualification for federal funding under Title IV-E of the Social Security Act. This outcome shall be measured for court orders entered after the entry of the Consent Decree.

27. By the end of the second reporting period, at least 80% of foster children in custody for six months or more shall have either had their six-month case plan review completed by the Juvenile Court within six months of their prior case plan review, or DFCS shall have submitted the child's six-month case plan to the Juvenile Court and filed a motion requesting a six-month case plan review within 45 days of the expiration of the six-month period following the last review. By the end of the third reporting period, at least 85% of foster children in custody for six months or more shall have either had their six-month case plan review completed by the Juvenile Court within six months of their prior case plan review, or DFCS shall have

submitted the child's six-month case plan to the Juvenile Court and filed a motion requesting a six-month case plan review within 45 days of the expiration of the six-month period following the last review. By the end of the fourth reporting period, at least 95% of foster children in custody for six months or more shall have either had their six-month case plan review completed by the Juvenile Court within six months of their prior case plan review, or DFCS shall have submitted the child's six-month case plan to the Juvenile Court and filed a motion requesting a six-month case plan review within 45 days of the expiration of the six-month period following the last review.

28. By the end of the second reporting period, at least 95% of foster children in custody for twelve or more months shall have either had a permanency hearing held by the Juvenile Court within 12 months of the time the child entered foster care or had his or her last permanency hearing, or DFCS shall have submitted the documents required by the Juvenile Court for and requested a permanency hearing within 45 days of the expiration of the 12-month period following the time the child entered foster care or had his or her last permanency hearing.

29. By the end of the third reporting period, no more than 5% of all children in the physical custody of DHR/DFCS for 12 months or more shall have had a lapse in their legal custody within the prior 13 months. For the purposes of this outcome measure, a lapse in legal custody is defined as any period of expired legal custody. This Outcome Measure shall not apply to children who have been placed in the custody of another person and returned to the custody of DFCS during the 13-month period.

30. Meeting children's service needs: By the end of the second reporting period, at least 80% of children in care at a point in time at the end of the reporting period shall not have any unmet medical, dental, mental health, education or other service needs, according to the service needs documented in the child's most recent case plan. By the end of the fourth reporting period, at least 85% of children in care at a point in time at the end of the reporting period shall not have any unmet medical, dental, mental health, education or other service needs, according to the service needs documented in the child's most recent case plan.

31. By the end of the second reporting period and continuing thereafter, no more than 10% of all children in foster homes shall be placed in foster care homes that

exceed the capacity limits referenced in Section 5.C.4.e. of this Consent Decree, concerning the requirement that no child shall be placed in a foster home if that placement will result in more than three (3) foster children in that foster home, or a total of six (6) children in the home, including the foster family's biological and/or adopted children.

16. ACCOUNTABILITY

A. The Court shall appoint James T. Dimas and Sarah Morrison as the Court's independent Accountability Agents. In the event that either Mr. Dimas or Ms. Morrison is unable to fulfill his or her duties under this agreement, the parties will select a replacement with the advice and consent of the remaining Accountability Agent. The parties agree that data support will be provided to the Accountability Agents by Chapin Hall Center for Children at the University of Chicago and Georgia State University. The Accountability Agents shall conduct the factual investigation and verification of data and state documentation necessary to compile and to issue public record reports on State Defendants' performance relative to the terms of the Consent Decree directly to the Court and to the parties. These reports shall be issued for each six month reporting period, commencing approximately 90 days after the close of the first reporting period.

B. DHR, through its employees or agents, will collect data with regard to each element of performance under this Consent Decree, and make it available on a timely basis to the Accountability Agents. DHR shall cooperate with the Accountability Agents in providing access to personnel, documents and other information necessary to perform their duties, as determined by the Accountability Agents, including without limitation interviews with agency staff, contract agency personnel, and interviews with DHR clients. The Accountability Agents shall conduct case record and other reviews as they deem necessary, including recommending or requiring DHR to conduct regular case reviews according to a systematic process.

C. DHR shall provide the Accountability Agents and/or the organizations through which they are employed with the necessary resources to perform their duties, including payment of their approved fees and expenses in accordance with state regulations. The Accountability Agents will prepare an initial budget proposal to the parties and the Court within 30 days of the signing of the consent decree. This budget will be updated and revised annually on or about the anniversary date of entry of the consent decree.

D. All actions required for Plaintiff class members shall be documented within the individual case file of each member of the class on a timely and accurate basis. DFCS shall ensure that all required information concerning

all foster parents, whether supervised by DFCS or by private providers, is timely and accurately entered into a foster parent file for each foster parent. DFCS shall ensure that a copy of all required information concerning contract agency providers is timely and accurately entered into a file for each contract agency provider and housed centrally at DFCS.

17. ENFORCEMENT

A. Except for the Principles set forth in Section 3 ("the Principles"), all provisions of this Consent Decree are separately and independently enforceable.

B. All provisions of this Consent Decree shall apply to all class members, regardless of whether they are in custody under the direct supervision of DCFS or of a contract provider.

C. If Class Counsel notify State Defendants that, to the best of Class Counsel's knowledge, information, and belief (formed after an inquiry reasonable under the circumstances), State Defendants are in violation of this Consent Decree, Plaintiffs may give notice to State Defendants in writing, and if so shall state with specificity the alleged noncompliance.

D. Except when Class Counsel allege, in conformity with subsection E below, the existence of imminent danger of substantial

harm to class members, the provisions of this paragraph shall apply.

1. When notice of an alleged violation is given pursuant to subsection C, above, State Defendants shall respond to Class Counsel in writing within 25 days by asserting that Class Counsel has alleged only a violation of the Principles, by denying that any substantial noncompliance has occurred, or by accepting (without necessarily admitting) the allegation of noncompliance and proposing steps that State Defendants shall take, and by when, to cure the alleged noncompliance.

2. If State Defendants (a) fail to respond within 25 days; (b) assert that Class Counsel has alleged only a violation of the Principles; or (c) deny that any substantial noncompliance has occurred, Class Counsel may thereafter seek an appropriate judicial remedy.

3. If State Defendants timely respond by accepting noncompliance and proposing curative action by a specified deadline, Class Counsel may accept State Defendants' proposal or may offer a counterproposal for a different curative action or deadline and negotiate over the appropriate action and deadline, but in no event shall Class Counsel seek an appropriate judicial remedy for the accepted noncompliance until at least 45 days after State Defendants have responded

under subsection D.1 above and until both sides have conferred in good faith to resolve any differences. The parties may, by mutual agreement, extend the time period specified in this subsection.

4. If no agreement on the issue of appropriate curative action or deadline is reached within the timeframe set in subsection D.3 above, Class Counsel may seek an appropriate judicial remedy.

5. If the parties reach agreement on a plan and timetable for curative action, but State Defendants thereafter fail to implement the curative action within the time specified in the agreement, Class Counsel may seek an appropriate judicial remedy upon ten (10) days written notice to State Defendants.

6. If the parties reach agreement on a plan of curative action and State Defendants implement the plan, but the plan fails to correct substantially the alleged violation within the time specified in the agreement, Class Counsel may seek an appropriate judicial remedy upon ten (10) days written notice to State Defendants, unless State Defendants issue a written revised proposal for curative action accepting that the violation alleged in Class Counsel's initial noncompliance notice is continuing, and specifying: (i) why, in their view, the initial plan of curative action failed to produce compliance

by the deadline and (ii) a revised proposal for curative action specifying a deadline for compliance.

7. If State Defendants issue a timely revised proposal for curative action and deadline in conformance with subsection D.6. above, the parties shall engage in good faith negotiations to attempt to reach agreement on a revised plan for curative action and deadline. If the parties fail to reach agreement on a revised plan within 25 days of State Defendants' issuance of a revised proposal, Class Counsel may seek an appropriate judicial remedy.

8. If the parties reach agreement on a revised plan for curative action but that revised plan fails to correct substantially the noncompliance within the time specified in the agreement, Class Counsel may seek an appropriate judicial remedy within ten (10) days written notice to State Defendants; provided, however, that the parties may, at their option, continue to attempt to reach agreement on further curative action, further extension of the compliance deadline specified in the Consent Decree, or modification of the Consent Decree.

E. The provisions of this paragraph shall apply when Class Counsel allege the existence of imminent danger of substantial harm to class members.

1. If Class Counsel acting in conformity with subsection C above notify State Defendants that, to the best of Class Counsel's knowledge, information, and belief (formed after an inquiry reasonable under the circumstances), a violation of this Consent Decree has caused or threatens to cause an imminent danger of substantial harm to class members, Class Counsel may give emergency notice of their allegations to State Defendants by electronic mail or facsimile transmission, and if so, shall state with specificity the alleged violation and the alleged imminent danger of substantial harm.

2. Within four business hours of the receipt by the State Defendants of Class Counsel's emergency notice, State Defendants shall respond with their position by electronic mail or facsimile transmission.

3. If State Defendants fail to respond within 4 business hours, or if State Defendants respond by denying the danger is imminent, the threatened harm is substantial, or there is substantial noncompliance with the Consent Decree, Class Counsel may thereafter seek an appropriate judicial remedy.

4. If State Defendants timely respond to an emergency notice with a proposal for specific investigative or curative steps, the parties shall immediately thereupon

engage in good faith efforts to reach agreement on appropriate investigative or curative action, including a time period for implementation.

5. If the parties are unable after conferring in good faith to agree on appropriate investigative and curative action and a timetable for implementation, Class Counsel may seek an appropriate judicial remedy.

F. Class Counsel and their clients shall not issue a noncompliance notice or seek a judicial remedy for the first six months after entry of this Consent Decree except with respect to an alleged case of imminent danger of substantial harm to class members, as described in subsection E above. Nothing in this Consent Decree shall authorize or enable the Class or its Counsel to initiate discovery without order of the Court following the filing of a motion by Class Counsel as authorized by the Federal Rules of Civil Procedure and the local rules of Court.

18. QUALITY ASSURANCE

DFCS shall maintain an appropriate quality assurance system that will meet the requirements of federal law, and will monitor, through case reviews, Fulton and Dekalb County DFCS' compliance with DFCS policy and the terms of this Consent Decree.

19. DURATION OF DECREE

A. With respect to the State Defendants, this Consent Decree shall remain in effect until (1) State Defendants are in substantial compliance with the final measures on all Outcome Measures in Section 15 of this Consent Decree simultaneously for three consecutive reporting periods; and (2) a motion to terminate jurisdiction over this Consent Decree is approved by the Court. Plaintiffs shall not contest a timely and appropriate motion to terminate unless: (i) Plaintiffs dispute State Defendants' assertion that they have achieved and sustained substantial compliance on all Outcome Measures for the requisite time period; (ii) an unresolved motion relating to non-compliance with any other provision of this Consent Decree pursuant to Section 17 remains pending; or (iii) any Court Order or Stipulation providing a remedy for a prior allegation of such non-compliance with any other provision of this Decree is in effect or has not been complied with at the time of the motion to terminate.

B. The parties intend and agree that this Consent Decree shall remain in effect and shall be enforceable by a court of competent jurisdiction for the entire duration of this Consent Decree as provided in Section 19.A. above. The parties intend and agree that State Defendants may only request termination of jurisdiction under the terms of Section 19.A.(1) above.

C. The parties acknowledge that this Consent Decree is a final resolution of all claims of any type on behalf of Plaintiff class members, whether known or unknown, that have been brought or could have been brought by or on behalf of the Plaintiffs against the State Defendants up through the date on which the Consent Decree is entered. This paragraph explicitly does not bar claims on behalf of any children in Fulton or DeKalb Counties concerning any programs or services for children prior to a child's placement into State custody, including, but not limited to, any diversion, differential response, or other programs or services providing an alternative to the investigation and/or substantiation of a report of abuse or neglect and/or the removal of a child from their home and placement into State custody, and any programs or services for investigations of reported abuse or neglect for children not in State custody.

D. In the interest of permitting the parties to focus upon and achieve the objectives of this Consent Decree, Plaintiffs agree that they shall not commence any new action for systemic declaratory, injunctive or other form of equitable relief based on facts, events, actions or omissions by the State Defendants that relate in any way to any claim that was raised or could have been raised in the present case and that occur after the entry of this Consent Decree and prior to the entry of a termination order pursuant to this Section. This paragraph explicitly does not bar claims

on behalf of any children in Fulton or DeKalb Counties concerning any programs or services for children prior to a child's placement into State custody, including, but not limited to, any diversion, differential response, or other programs or services providing an alternative to the investigation and/or substantiation of a report of abuse or neglect and/or the removal of a child from their home and placement into State custody, and any programs or services for investigations of reported abuse or neglect for children not in State custody.

E. This paragraph shall not prevent an action, at any time, by an individual plaintiff for damages or equitable relief tailored solely to the specific circumstances of that individual plaintiff. Further, nothing in this paragraph shall prevent Plaintiffs in any action for systemic declaratory, injunctive or other form of equitable relief brought after the entry of a termination order pursuant to this Section and based on claims arising after the entry of such order, from offering into evidence facts arising prior to such order.

20. MISCELLANEOUS PROVISIONS

A. Each party agrees that it will perform its obligations under this Consent Decree in accordance with all applicable laws.

B. Unless otherwise provided in this Consent Decree, all notices under this Consent Decree shall be deemed duly given upon delivery by

hand, or three days after posting, if sent by registered mail, return receipt requested. All notices under this Decree shall be provided to the party at the address set forth as follows:

As to Plaintiffs:

Marcia Robinson Lowry, Esq.
Ira Lustbader, Esq.
Children's Rights, Inc.
404 Park Avenue South, 11th Floor
New York, NY 10016
Phone: (212) 683-2210
Facsimile: (212) 683-4015
E-mail: mlowry@childrensrights.org;
ilustbader@childrensrights.org

Jeffrey O. Bramlett, Esq.
Bondurant, Mixson & Elmore, L.L.P.
3900 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
Phone: (404) 881-4100
Facsimile: (404) 881-4111
E-mail: Bramlett@bmelaw.com

As to State Defendants:

Brenda K. Woodard, Esq.
Chief Legal Officer
Georgia Department of Human Resources
2 Peachtree Street, N.W.
Atlanta, GA 30303
Phone: (404) 656-4421
Facsimile: (404) 657-1123
E-mail: bkwoodard@dhr.state.ga.us

Steven E. Love (or his successor)
Acting Director, Division of Family and
Childrens Services
Georgia Department of Human Resources
2 Peachtree Street, N.W.
Atlanta, GA 30303
Phone: (404) 657-5202
Facsimile: (404) 657-5105
E-mail: selove@dhr.state.ga.us

Shalen S. Nelson, Esq. (or her designee)
Senior Assistant Attorney General
State Law Department
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334
Phone: (404) 656-3377
Facsimile: (404) 463-1062
E-mail: shalen.nelson@law.state.ga.us

C. This Consent Decree constitutes the entire agreement between the parties with regard to the subject matters contained therein, and hereby supersedes all prior agreements, representations, statements, negotiations, and undertakings.

D. All parties to the Consent Decree have participated in its drafting and, consequently, any ambiguity shall not be construed either for or against any party.

E. If, for any reason, the Court fails or refuses to enter this proposed Consent Decree as signed by the authorized signatories, or as altered in accordance with their consent freely given prior to entry, then the proposed

Consent Decree itself, and any agreement or statement contained in the proposed Consent Decree, is null and void and may not be enforced.

F. The Department of Human Resources shall bear all costs of notice prescribed by the Court pursuant to Fed. R. Civ. P. 23 in connection with the process for final Court approval of this Consent Decree.

G. DHR agrees to provide data and information concerning children in Fulton and DeKalb Counties to the Accountability Agents sufficient to enable the Accountability Agents to issue reports at the intervals specified in Section 16.A., verifying the items below. For purposes of the following items, "children" is meant to include only those children who were not in foster care custody at the time that the substantiated maltreatment took place, and "cases" is meant to include only those cases involving families with children who were not in foster care custody at the time there was a referral into DHR's diversion program.

1. (a) The number of children in each county who, during the reporting period, experienced substantiated maltreatment, and (b) the number and percentage of children in (a) of this item who also experienced substantiated maltreatment during the preceding 12 month period. For purposes of this item, for the term "percentage," the numerator would be the number of children in (a) who had

substantiated maltreatment during the preceding 12 months, and the denominator would be all children who had substantiated maltreatment during the reporting period.

2. (a) The number of cases in each county during the reporting period in which there was a referral into DHR's diversion program, and (b) the number and percentage of the cases in (a) of this item in which there was substantiated maltreatment within 11-365 days after the referral, For purposes of this item, for the term "percentage," the numerator would be the number of cases in (a) in which there was substantiated maltreatment within 11-365 days after referral to DHR's diversion program, and the denominator would be all cases referred to DHR's diversion program during the reporting period. In addition, for purposes of this item, "DHR's diversion program" refers to action taken by the Department which provides for an alternative to the opening of a CPS case and/or the removal of children from their home and placement into state custody by providing additional instruction, services, or support to the child's legal custodian either by DFCS or other family and child services agencies and programs.

21. RELIEF FOR NAMED PLAINTIFFS

A. The State Social Services Director shall monitor the individual cases of the named plaintiffs in this action for as long as they are in DHR/DFCS custody, or if they are discharged from and return to DHR/DFCS custody, to ensure that all necessary and appropriate plans are developed and implemented and that all necessary placements and services are provided. As of the date of the signing of this Consent Decree, two named plaintiffs are in DHR/DFCS custody.

B. The parties shall meet and attempt to agree on necessary services and plans for the named plaintiffs that remain in DHR/DFCS custody within 60 days after the parties sign this Consent Decree.

C. The DHR Commissioner, through the State Social Services Director, shall ensure that Plaintiffs' Counsel receive documents and reports every 90 days concerning the status of the named plaintiffs in this action, services that have been provided, and implementation of plans, for as long as they are in DHR/DFCS custody. Plaintiffs' Counsel shall receive notification within one calendar day of any significant events or developments concerning the named plaintiffs in this action for as long as they are in DHR/DFCS custody, including but not limited to: any change in placement, services, permanency goal or permanency plans; any reports of any incident of alleged abuse or neglect or violations of disciplinary policy involving any

of the named plaintiffs or occurring at the placements where any of the named plaintiffs are placed; any other serious incidents involving any of the named plaintiffs or occurring at the placements where any of the named plaintiffs are placed.

D. A staffing shall be held in-person or by conference call every 90 days upon Plaintiffs' request, within 10 days after Plaintiffs receive updated documents and reports referenced in Paragraph C above, for the purpose of discussing, with Plaintiffs' Counsel, the status of the named plaintiffs in this action for as long as they are in DHR/DFCS custody, services that have been provided, and implementation of plans. The staffing shall include plaintiffs' counsel, the State Social Services Director or his designee, the child's DFCS ease manager, the private agency case manager, if any, the child, and such others that may be needed for the discussion. The parties may on consent modify the schedule of any particular staffing under this paragraph.

22. ATTORNEYS' FEES AND EXPENSES OF LITIGATION

A. For purposes of the Consent Decree, the parties acknowledge that Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 23(h).

B. The parties shall attempt without court intervention to resolve the proper amount of Class Counsel's fees and expenses of litigation. If any agreement is reached by the parties regarding recovery of fees and expenses of litigation, the Court shall determine whether the agreed amount and mode of payment are appropriate in accordance with applicable law and procedure.

C. If the parties cannot reach agreement on the proper amount of attorneys' fees and expenses of litigation, Class Counsel shall file an application for fees and expenses in accordance with the requirements of applicable law and procedure within twenty-five (25) days following entry of this Consent Decree. Any objection to Class Counsel's motion seeking a fee award shall be filed within twenty-five (25) days following the docketing of Class Counsel's motion. The amount of any award shall be determined by the Court in accordance with the requirements of applicable law and procedure.

D. All parties reserve whatever rights each may have to appeal the amount of attorneys' fees and expenses awarded by the Court.

CONSENTED TO:

For the Plaintiffs:

/s/ Marcia Robinson Lowry — 6/15/05

Marcia Robinson Lowry, Esq. — Date

Co-Lead Counsel

/s/ Jeffrey O. Bramlett — 6-15-05
Jeffrey O. Bramlett, Esq. — Date
Co-Lead Counsel

For the State Defendants:

/s/ Sonny Perdue — 6/27/05
Sonny Perdue — Date
Governor, State of Georgia

/s/ B.J. Walker — 6/29/05
B.J. Walker — Date
Commissioner, Georgia Department of Human Resources

APPENDIX A

I. REQUIRED PROGRAM/SYSTEM FUNCTIONS:

A. **INTAKE MANAGEMENT**: This function consists of processing referrals for service, conducting an investigation, and assessing the need for service.

1. **INTAKE**

a. **Record contact/referral** – The automated system must record initial contacts regarding allegations of abuse or neglect, or provide for the input of a formal referral for protective services. voluntary placement services, juvenile corrections and other services.

b. **Collect intake/referral information** – The automated system must

allow for input of available situation and demographic information, including the cross-referencing of relationships among participants and the reason for referral.

c. **Search for prior history (persons/incidents)** – The automated system must provide for a search to the database(s) to check for prior incidents and other available information. For a single incident, the system must allow for more than one report of that incident by including information on each individual or agency making a report (such additional reports may or may not be counted in the total number or reports, depending on State policy).

d. **Record "information only" requests** – The automated system must provide for the recording of calls or contacts that do not involve a specific allegation or referral.

2. **SCREENING**

a. **Evaluate intake information** – The automated system must support the evaluation of the received information to determine the necessity of establishing a case.

b. **Record the results of the screening evaluation** – The automated system must provide for the

recording of the determination resulting from the screening process.

c. **Establish case record** – The automated system must provide for the establishment of a new case, the association of a new allegation with an existing open case, or the reopening of a closed case.

d. **Assign case to worker** – The automated system must support and record the assignment of the case to a worker and for the tracking of that case through the process.

e. **Refer for investigation and/or service, as appropriate** – The automated system must support the referral/transfer of the case for investigation, if necessary, or for assessment, if the allegation is not related to maltreatment.

3. **INVESTIGATION**

a. **Collect and record investigation information** – The automated system must provide for the input of information collected during the investigation process, including the recording of contacts made during the investigation.

b. **Record investigation decision** – The automated system must provide for the recording of the decision resulting from the investigation.

c. **Generate documents as needed in response to investigation** – The system must support the preparation of alerts, notifications and reports required during, and as a result of, the investigative process.

4. **ASSESSMENT**

a. **Determine and record risk assessment** – The automated system must support the evaluation and determination of risk factors affecting the case (this may be initiated during intake or investigation)

b. **Perform risk assessment** – The automated system must perform an automated risk assessment, which may use rules-based technology to determine the relative level of risk.

c. **Collect and record special needs/problems** – The automated system must assist in the determination and documentation of special needs/problems (e.g., special education, developmental disabilities, medical assessment, etc.).

d. **Determine and record needed services** – The automated system must support the determination of needed services and record those services, including the assignment and recording of the level of care (placement locations, in-home care, etc.)

e. **Record client contacts** – The automated system must provide for the recording of client contacts in the electronic case folder.

f. **Prepare and record referrals to other agencies** – The automated system must provide for the preparation and recording in the electronic case folder of referrals to other agencies.

g. **Collect and record further case information** – The automated system must provide for the recording in the electronic case record of additional case information gathered during the assessment process.

h. **Generate documents, notices and reports based on review as needed** – The automated system must support the generation of documents, notices, and reports during, or resulting from, the assessment process.

B. **ELIGIBILITY**: This function consists of determining programs for which funding support is available for clients receiving services. Program eligibility must include funding for foster care/adoption payments and determining the type of programs that will allow a client to receive Medicaid coverage. This function is usually initiated sometime during the Intake Function.

1. **INITIAL ELIGIBILITY DETERMINATION**

   a. **Determine title IV-E eligibility** – The automated system must provide for the exchange and referral of information necessary to determine eligibility under title IV-E through an interface with the title IV-A system.

   b. **Verify eligibility for other programs** – The automated system must provide for the exchange and referral of information necessary to determine eligibility/status under other related programs such as title XIX (Medicaid) and title IV-D.

   c. **Record authorization decisions** – The automated system must provide for the recording of the eligibility authorization decisions.

   d. **Generate documents related to eligibility determinations** – The automated system must produce the alerts, notices and reports (e.g., exception reports) needed to provide information on and track the initial eligibility determinations.

2. **CHANGES IN ELIGIBILITY**

   a. **Redeterminations** – The automated system must provide for the processing of regularly scheduled and as needed program redeterminations

and recording of redetermination decisions.

b. **Generate documents related to eligibility determinations** – The automated system must produce the alerts, notices and reports (e.g., exception reports) needed to provide information on and track the changes in eligibility status.

C. **CASE MANAGEMENT**: This function entails the preparation of service plans, determining whether the agency can provide the services, authorizing the provision of services, and managing the delivery of those services. The service/case plan must include the required elements specified in section 475.

1. **SERVICE/CASE PLAN**

a. **Prepare and document service/ case plan** – The automated system must support case plan development by documenting the services, available in the State, that are required to meet the specific needs identified in the assessment function in such areas as:

i. **Adoption**: record and track information about adoptive placements and post-adoptive services, including subsidy benefits

ii. **Family preservation**: institute in-home services to prevent the need for placement

iii. **Foster care**: determine and track level of care, placement information, reunification services, legal requisites

iv. **Independent living**: determine and track services to provide transitional living assistance for State foster care youths

v. **Interstate compact**: process/ submit supervision requests from/with other states for children and youth

vi. **Identify and match services to meet client's case plan needs** – The system must provide automated support in the identification and matching of service needs and available resources.

vii. **Record contact with and acquisition of needed resources/ services** – The automated system must support and record the preparation of necessary service requests or referrals.

viii. **Track and update service/ case plan** – The automated system must support the monitoring of the progress of plan

and update of the service/case plan in the electronic folder.

ix. **Match client to placement alternatives, if needed** – The system must provide automated support in the identification and matching of clients with available placement alternatives.

x. **Generate documents as needed** – The automated system must support the generation of alerts, notices, and reports as necessary to track the progress of the service/case plan.

xi. **Request and record supervisory approval of plan, if needed** – The automated system must provide support for obtaining supervisory approval of the service/case plan.

xii. **Compute estimated and track actual costs of resources/ services** – The automated system must include a component which estimates and tracks the costs of required/provided resources and services to assist in service/case plan management and tracking.

xiii. **Identify program outcome measures** – The automated

system must include a component which identifies and tracks program outcome measures.

2. **CASE REVIEW/EVALUATION**

   a. **Generate alerts to conduct case review/evaluation as needed** – The automated system must support the timely identification and continued tracking of cases requiring review/evaluation.

   b. **Conduct and record results of case review** – The automated system must support the case review process and provide for documentation of the reassessment decisions in the electronic case folder, including documentation of action items resulting from the reassessment.

   c. **Generate documents, notices and reports based on review as needed** – The automated system must support the generation of documents, notices, and reports during, or resulting from, the evaluation process.

   d. **Record collateral contacts** – The automated system must provide for the recording of client collateral contacts and information resulting from those contacts.

3. **MONITORING SERVICE/CASE PLAN SERVICES**

   a. **Track and record services identified in the service/case plan** – The automated system must provide for the recording in the electronic case folder of the types, duration, and frequency of services.

   b. **Generate documents, notices and reports** – The automated system must support the generation of documents, notices, and reports to track the services and provided to the client.

D. **RESOURCE MANAGEMENT**: This function supports the maintenance and monitoring of information on an array of service providers, including prevention programs, placement services, and foster care providers.

1. **FACILITIES SUPPORT**

   a. **Record and update provider information** – The automated system must support the collection and maintenance of provider information such as license/certification status, types of services, level of care provided, level of care compliance and cost of care.

   b. **Generate alerts/action items on licensing status changes** – The automated system must support the timely identification and continued

tracking of cases and/or facilities requiring a review or other action as a result of a change in provider information.

c. **Generate reconciliation and evaluation reports as needed** – The automated system must support the generation of documents, notices, and reports, as needed.

2. **FOSTER/ADOPTIVE HOMES SUPPORT**

a. **Maintain and update foster care and adoptive home information as needed** – As appropriate to the type of home, the automated system must support the collection and maintenance of foster care and adoptive home information such as licensing decision, violations and revocations, required AFCARS information and received training.

b. **Record foster care home abused/neglect allegations and investigation results** – The automated system must support the identification of foster care families where allegations of abuse/neglect been reported and substantiated, as required by State law. The automated system must support the investigation of such allegations and document the results.

c. **Process foster care/adoptive home applications** – The automated system must provide for the recruitment and processing of foster family applications.

d. **Generate alerts/action items as needed if foster care license is revoked** – The automated system must support the identification and tracking of cases requiring a review or other action as a result of changing information.

3. **RESOURCE DIRECTORY**

a. **Maintain directory** – The automated system must provide a directory/inventory of available resources and services.

b. **Generate reports** – The automated system must support the generation of management reports, as well as other alerts, bulletins notices related to resource availability.

E. **COURT PROCESSING**: This function encompasses an array of legal activities and documentation procedures involving judicial events requiring action on the part of the State agency.

1. **COURT DOCUMENTS** – The automated system must provide for the preparation of State agency documents for the courts, such as petitions, letters,

attorney approvals, and supervisory approvals.

2. **NOTIFICATIONS** – The automated system must provide notifications to inform relevant parties of impending court actions.

3. **TRACKING** – The automated system must be used to monitor and track court-related events requiring State agency action, such as recording and outcomes for all petitions, trials, hearings, detention proceedings, periodic reviews, adoptions, and change of placements. Court decisions may be recorded in the electronic case folder.

4. **INDIAN CHILD WELFARE ACT** – The automated response systems must be used to support the Indian Child Welfare Act requirements.

F. **FINANCIAL MANAGEMENT**: This function tracks and manages financial transactions. It may be part of the SACWIS itself or may be an automated interface to a department or statewide financial system.

1. **ACCOUNTS PAYABLE** – The automated system must provide support for accounts payable to providers (billing, vouchers, etc.).

2. **ACCOUNTS RECEIVABLE** – The automated system must provide support for accounts receivable (e.g., overpayments, trust funds, SSI, etc.).

3. **CLAIMS** – The automated system must provide support for the generation of provider payment and remittance advice. The automated system must support the update procedures necessary to adjust the claims process as a result of notification of status changes (including information received from title IV-A and other Federal/State programs), including termination of the case.

G. **ADMINISTRATION**: This function incorporates procedures for ensuring support for efficient management of as well as reliable and accurate operation of the system.

1. **STAFF MANAGEMENT** – This function covers various aspects of agency human resources, maintaining information of employees, work assignments, and staff performance.

a. **Record and update employee information** – The system must contain records of employees, showing name, employee number and office. These records must also contain demographic information and results of Background Criminal Investigation (BCI) checks.

b. **Record and track case assignment** – The system must provide for the assignment of cases to workers, track workload assignments and identify on-call staff.

c. **Assist in workload management** – The system must support the decision-making process and the assignment of case to workers and help workers to manage their own caseloads by providing "to do" lists and prioritization of alerts.

2. **REPORTING** – This function produces information on a periodic and as-needed basis.

   a. **Produce Federal and State reports** – The system must generate required State and Federal reports (e.g., AFCARS) in either paper or electronic formats as required.

   b. **Produce reports** – The system must generate regular ad hoc management reports (e.g., workload status, client/case status, performance factors, outcome measures, etc.)

   c. **Produce statistical reports** – The system must generate statistical reports needed to assist in the analysis of the program.

3. **ADMINISTRATIVE SUPPORT** – This function incorporates procedures for assuring adequate documentation and accurate data.

   a. **Provide hardware and software security** – The hardware, telecommunications network, software applications and data must be

secured to protect from damage, destruction and loss, as well as fraud and abuse. Contingency plans and disaster recovery plans should be tested and readied in case of emergency.

b. **Archive and purge** – The system must provide for purging and archiving, as needed, of inactive records and closed cases

c. **Provided office automation** – The system must provide automation tools (e.g., word processing, ticklers, alerts, calendaring, electronic mail, system broadcast, etc.) apart and in addition to those tools available within the program functions.

d. **Provide on-line system documentation** – The system must provide an on-line policy/procedure manual, user guides, and other system documentation as needed, such as field help screens.

e. **Provide on-line training** – The system must provide on-line, computer-based training for system users.

II. **INTERFACES:** This function creates an electronic link between the child welfare and other systems to receive, transmit, and verify case and client information.

A. **REQUIRED INTERFACES**: The automated system must provide for a periodic electronic data interface with the following systems:

1. **Title IV-A (AFDC/TANF)**: The interface between the state's SACWIS and the Title IV-A system must (1) allow for the automatic exchange of common and/or relevant data between the two systems (to prevent duplicate entry), (2) accept and process updated or new case data and (3) identify potential duplicate payments under Title IV-E and Title IV-A programs.

2. **Title IV-B (Child Support Enforcement)**: the interface between the state's SACWIS and the Title IV-D system must (1) provide for the exchange of data necessary to establish a child support case, (2) accurately record child support collections on appropriate Title IV-E federal reports, (3) identify potential support resources for the Title IV-E child, (4) allow for the automatic exchange of common and/or relevant data between the two systems (to prevent duplicate entry), (5) accept and process updated or new case data, (6) capture the data necessary to report AFCARS foster care data element number 62, and (7) provide the Title IV-D system with the current foster care maintenance payment either from the

SACWIS or, if the state chooses, from a statewide financial system.

3. **Title XIX (Medicaid)**: the interface between the state's SACWIS and the Title XIX system must (1) provide for the exchange of information needed by the State Medicaid eligibility system to calculate and track Medicaid eligibility for children in foster care, (2) allow for the automatic exchange of common and/or relevant data between the two systems (to prevent duplicate entry), and (3) capture the data necessary to report AFCARS foster care element number 63.

4. **Child abuse and neglect ("NCAND") data system**: the interface between the state's SACWIS and CAN system and must (1) allow for the automatic exchange of common and/or relevant data between the two systems (to prevent duplicate entry). Relevant data should include data collected during the screening, investigation and assessment of an incident, as well as SACWIS case management information that had been collected during a previous foster care episode.

B. **OTHER INTERFACES** – The automated system must provide for interfaces with other automated systems within the State, such as:

   1. State Central Registry

2. Social Security Administration for title II and SSI information
3. State financial system
4. State licensing system
5. Vital Statistics
6. Court system
7. Juvenile Justice
8. Mental health/retardation
9. State Department of Education

APPENDIX B

I. **QUALITY ASSURANCE**: It is essential that information systems developed under the SACWIS regulations incorporate automated quality assurance measures, processes, and functions. One aspect of quality assurance is to ensure the completeness, accuracy and consistency of critical data. In order to better assure validity and accuracy, SACWIS must be designed to support/enforce good case management practices as well as to provide the capability for profiling pertinent case file characteristics and outcome measurements. The following is necessary to meet quality assurance requirements:

   A. The SACWIS must provide appropriate edits, range checks and prompts for critical or incomplete data. Critical data includes anything required for state or federal reporting or audit (e.g., AFCARS data, child welfare program and eligibility reviews).

B. The SACWIS must provide for a review of case files for accuracy, completeness and compliance with federal requirements and state standards, including procedures for appropriate supervisory oversight and authorization.

C. The system must allow for random sampling, based on variable characteristics, for audit purposes. The system must be capable of recording and tracking the results of an audit, as well as any necessary corrective actions identified.

D. The system must facilitate the establishment and tracking of outcome measures by program managers, and support trend analysis of results.

E. The system must generate summary management reports on client demographics and needs. The system must produce reports on the length of time in foster care categorized by identified service needs and services provided.

F. The system must track referrals and all required time sensitive actions for Title IV-B and IV-E related cases, such as initial and ongoing Administrative Case Reviews, investigations, and time sensitive treatment and service plans. At the point a required action is delayed beyond a federal, state or court mandated time frame, the system must alert line, supervisory and management staff, when appropriate.

G. In cases where a reviewer enters information on an apparent problem of abuse or neglect in a foster home, the system must automatically request an investigation and track the case to ensure its completion.

H. The system must maintain and link variable and static data used to determine eligibility for Title IV-E payments. The system must also establish data entity relationships between providers, clients and payments.

I. The SACWIS (or separate financial system) must account for appropriate financial reconciliation of payments including overpayments and recovery by occurrence.

J. The system must capture and transmit all known cases in the AFCARS report, including cases with incomplete information or untimely actions.

K. The system must contain all data necessary to effectively manage a case, and must be able to track a child across multiple occurrences and/or cases.

PETITIONER'S BRIEF

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SUPREME COURT, U.S.

No. 08-970

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained, or are these factors already included in the lodestar calculation?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Defendants-Appellants and Petitioners: Sonny Perdue, in his official capacity as Governor of the State of Georgia; Georgia Department of Human Resources; B.J. Walker, in her official capacity as Commissioner of the Georgia Department of Human Resources; Fulton County Department of Family and Children Services; Dannette Smith, in her official capacity as Director of the Fulton County Department of Family and Children Services; DeKalb County Department of Family and Children Services; and Walker E. Solomon, II, in his official capacity as Director of the DeKalb County Department of Family and Children Services.

Plaintiffs-Appellees and Respondents: Kenny A., by his next friend Linda Winn; Kara B., by her next friend Linda Pace; Maya C., by her next friend Linda Pace; Phelicia D., by her next friend Theresa Roth; Sabrina E., by her next friend, Rebecca Silvey; Korrina E., by her next friend Rebecca Silvey; Tanya F., by her next friend Carol Huff; Priscilla G., by her next friend Roslyn M. Satchel; and Briana H., by her next friend Linda Pace, on their own behalf and on behalf of all others similarly situated.

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BRIEF FOR PETITIONERS

Governor Sonny Perdue and the other Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed the District Court's award of a $4,509,602.18 enhancement to the lodestar amount of $6,012,802.90 awarded as attorney's fees to Respondents.

OPINIONS BELOW

The fees opinion and order of the United States District Court for the Northern District of Georgia, dated October 3, 2006, is officially reported at 454 F. Supp. 2d 1260 (N.D. Ga. 2006). (Pet. App. at 94-172.)[1]

The panel opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 3, 2008, is officially reported at 532 F.3d 1209 (11th Cir. 2008). (Pet. App. at 1-93.)

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit denying further review, including the dissents thereto, dated November 5, 2008, is officially reported at 547 F.3d 1319 (11th Cir. 2008). (Pet. App. at 173-223.)

[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, which was filed on January 29, 2009.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on July 3, 2008. (Pet. App. at 1-93.) The order denying rehearing *en banc* was entered on November 5, 2008. (Pet. App. at 173-223.) The Petition for a Writ of Certiorari was filed on January 29, 2009, and granted as to Question 1 presented by the petition on April 6, 2009. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be

held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

On June 16, 2002, a class action complaint originally filed by Plaintiffs in the Superior Court of Fulton County, Georgia, was removed to the United States District Court for the Northern District of Georgia. (Dkt. 1.) The complaint, filed on behalf of 3,000 foster children against numerous State of Georgia officials, alleged both constitutional and statutory violations and sought injunctive relief to alter the State's administration of its foster care system in Fulton and DeKalb Counties, two counties in metropolitan Atlanta.[2] Plaintiffs were represented by attorneys from Children's Rights, Inc. ("CRI"), a self-described "national advocacy group working to reform failing child welfare systems on behalf of hundreds of thousands of abused and neglected children who depend on them for protection and care," http://www.childrensrights.org/about/mission-and-methods (last visited June 16, 2009), and the Atlanta law firm of Bondurant, Mixson & Elmore LLP. (Dkt. 1.)

[2] Plaintiffs also sued Fulton and DeKalb Counties for the alleged failure to provide foster children with adequate and effective legal representation. (Dkt. 1.) Those allegations were litigated between Plaintiffs and those counties separately and are not part of this appeal.

According to Plaintiffs' counsel's billing records, timekeepers spent more than 1,600 hours on pre-suit investigation and drafting the complaint and mandatory disclosures, even though CRI had filed numerous other complaints against state-run foster care systems prior to the Georgia litigation. (Dkt. 495-506); *see* http://www.childrensrights.org/reform-campaigns/legal-cases (last visited June 16, 2009).

The first stage of the litigation concerned Plaintiffs' efforts to enjoin the operation of two emergency children's shelters in Fulton and DeKalb Counties. Following a short period of expedited discovery, Plaintiffs filed a motion for preliminary injunction, and the District Court conducted a four-day hearing on the motion in November 2002. (Dkt. 50, 104, 108, 109, 110.) Although the District Court found some deficiencies in the operation of the shelters, it denied Plaintiffs' motion to enjoin the shelters' operation based on the State's representation that the shelters would be closed within a period of months and children would be sent to alternative emergency placements. (Dkt. 126.) That action in fact occurred, mooting Plaintiffs' claims with respect to the shelters. (Dkt. 157 & 160.) The billing records of Plaintiffs' counsel state that they expended nearly 1,800 hours preparing and litigating this preliminary injunction motion. (Dkt. 495-506.)

The litigation next proceeded into a period of discovery through February 2004 on the remainder of

the claims contained in the complaint.[3] Plaintiffs' counsel's billing records reveal more than 16,000 hours expended on document production and analysis, preparing witnesses for and taking depositions, working on discovery motions, intra- and inter-office conferences, and preparing expert witnesses and reports during this time period. (Dkt. 495-506.)

Following the close of discovery, the State filed a motion for summary judgment, which was denied by the District Court. (Dkt. 243 & 410.) Plaintiffs' billing records show that fifteen separate timekeepers spent 1,721 hours preparing Plaintiffs' response to the State's motion for summary judgment, which was filed 45 days after the State's motion. (Dkt. 261, 495-506.)

A trial date was originally set for January 2005, but the District Court referred the case to mediation after the court's efforts to encourage the parties to settle the case on their own failed. (Dkt. 363, 364, 366, 380, 390.) To facilitate mediation, the District Court ultimately postponed the date for the trial on the merits indefinitely. (Dkt. 425 & 427.) Mediation proceeded over the course of four months, resulting in a consent decree approved by the District Court on October 27, 2005, which contained a comprehensive

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[3] The State filed a motion to dismiss, which was denied in substantial part by the District Court, and opposed Plaintiffs' motion for class certification, which was granted by the District Court. *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (Dkt. 193).

agreement on all pending issues except the amount of attorney's fees and expenses to award to Plaintiffs as prevailing parties pursuant to 42 U.S.C. § 1988. (Dkt. 486 & 488.) Plaintiffs' counsel spent more than 2,100 hours working on mediation and settlement, 1,150 hours working on pretrial matters, and an additional 2,125 hours preparing for a trial that never took place. (Dkt. 495-506.)

On December 9, 2005, Plaintiffs' counsel filed their application for an award of attorney's fees and expenses, claiming that thirty-eight separate time-keepers expended nearly 30,000 hours on the case[4] and seeking recovery of attorney's fees at their then-current hourly rates, which ranged from a high of

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[4] Given that the case was filed in June 2002 and a Consent Decree was entered in October 2005, the 30,000 hours of attorney and paralegal time expended in this case equates to one person working on this matter on behalf of Plaintiffs for more than 24 hours per day, every day, weekends and holidays included, for three-and-one-third years. *See, e.g.*, *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1281 (N.D. Ga. 2006) ("[T]he number of hours expended was unreasonable. One need only consider the fact that 1,720 hours is the equivalent of one attorney working full time for nearly an entire year to conclude that no response to a motion for summary judgment justifies such an expenditure of time."); *id.* at 1277 ("At the same time, based on its experience in other complex, document intensive cases, the Court finds that more than 7,100 hours expended on document review, and analysis over the two-and-one-half years between the filing of the complaint and the commencement of mediation is unreasonable. That is the equivalent of more than one full-time employee reviewing and analyzing documents continuously for that entire time period.").

$495 to a low of $215. (Dkt. 495.) This resulted in a purported lodestar (hours expended multiplied by hourly rate) of $7,171,434.30, but Plaintiffs requested that the court grant them an enhancement of twice that purported lodestar, for a total fee award of $14,342,868.60. (Dkt. 495.) The State opposed the application, asserting in part that the lodestar should be reduced due to excessive hours and that the enhancement was not authorized based on the existing precedent of this Court. (Dkt. 510.)

The District Court, after finding that many of Plaintiffs' counsel's entries were "vague," "noncompensable," "excessive," and "unreasonable," reduced Plaintiffs' lodestar through a 15% percent across-the-board reduction in hours claimed, resulting in a monetary reduction of more than $1 million ($6,012,802.90 awarded, as compared to $7,171,434.30 requested by Plaintiffs). *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1274-77, 1279-81, 1283, 1286 (N.D. Ga. 2006). However, even after recognizing that "most of the factors relevant to calculating a reasonable fee are already reflected in the lodestar amount" and should not serve as grounds for increasing the lodestar, the District Court nevertheless adjusted the lodestar upward by a 1.75 multiplier, for a total fee award of $10,522,405.08. *Id.* at 1288, 1290.

The District Court justified its $4.5 million enhancement to the lodestar on three grounds. First, the District Court concluded that the quality of service was "far superior to what consumers of legal services in the legal marketplace in Atlanta could

reasonably expect to receive for the rates used in the lodestar calculation," even though the rates, which ranged from $215 to $495 per hour, were "consistent with the prevailing market rates in Atlanta for comparable work" and were the rates that Plaintiffs' counsel submitted in their application. *Id.* at 1285, 1288. This conclusion was supported, according to the District Court, because: (1) class counsel were required to advance expenses of $1.7 million over a three-year period, (2) class counsel were not paid on an ongoing basis while the work was being performed, and (3) class counsel's ability to recover fees was contingent on the outcome of the case. *Id.* at 1288.

Second, the District Court found that the "superb quality" of class counsel's representation "far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. In the District Court's view, Plaintiffs' counsel "brought a higher degree of skill, commitment, dedication, and professionalism" to the litigation than the District Court had observed "in any other case during its 27 years on the bench." *Id.* at 1289.

Third, the District Court viewed Plaintiffs' success, achieved only by the State's agreement to settle the case through a consent decree following court-ordered mediation, as "truly exceptional" and providing "sweeping relief to the plaintiff class." *Id.* The District Court observed that "[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class

has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

A panel of the Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court. *Kenny A. v. Perdue*, 532 F.3d 1209 (11th Cir. 2008). In recognizing this Court's decisions "that bend[ ] decidedly against enhancements" of the lodestar, one of the panel members, Judge Carnes, concluded that "[t]he district court's $4.5 million enhancement to the $6 million lodestar figure in the present case cannot be squared with the Supreme Court decisions." *Id.* at 1221, 1225 (Carnes, J., concurring). According to Judge Carnes, none of the factors upon which the District Court relied (quality of service, contingency, and results obtained) justified the boosting of the attorney's fee award. *Id.* at 1225-31.

Nevertheless, the panel as a whole concluded that it was "not free to decide the enhancement issue" based on the Eleventh Circuit's earlier decisions in *NAACP v. Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), both of which "were issued after the Supreme Court last spoke on the subject of enhancements for quality of representation and superior results, which was in the *Delaware Valley I* case." *Kenny A.*, 532 F.3d at 1236-37. In *NAACP* and *Norman*, the Eleventh Circuit vacated district court orders denying enhancements for superior results and issued remand instructions which left open the possibility that superior results coupled with

superior performance could serve as the basis for an enhancement to the lodestar. *See NAACP*, 812 F.2d at 1336-37; *Norman*, 836 F.2d at 1302, 1306. Judge Carnes concluded that the panel was bound to follow *NAACP* and *Norman* based on the prior panel precedent rule, notwithstanding his conclusion that those holdings were wrong and conflicted with this Court's relevant precedents.[5] *Kenny A.*, 532 F.3d at 1238 (Carnes, J., concurring). Judge Carnes concluded by stating:

> Of course, this Court sitting *en banc*, or the Supreme Court, can overrule any prior decisions of this Court. Unless and until this Court does overrule *NAACP* and *Norman*, we are constrained to let stand the $4,500,000 enhancement to the lodestar amount that is included in the district court's judgment in this case.

Id. at 1242.

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[5] Judge Wilson agreed that the panel was bound by the prior panel precedents of *NAACP* and *Norman*, but believed that those precedents correctly held that enhancements of the lodestar amount should be permitted for results obtained and quality of representation. *Kenny A.*, 532 F.3d at 1242 (Wilson, J., concurring). Judge Hill also agreed that the panel was bound by these prior panel precedents and expressed his view that the opinions of Judges Carnes and Wilson were scholarly and "will be of interest to jurists who might wish to pursue the matter in further proceedings, should any arise." *Id.* at 1251 (Hill, J., concurring).

The subsequent petition for rehearing *en banc* was denied by a 9-3 vote. *Kenny A. v. Perdue*, 547 F.3d 1319 (11th Cir. 2008). Judge Carnes, joined by Judges Tjoflat and Dubina, authored a dissent from the denial of rehearing *en banc* for "the first time in sixteen years on the bench," opining that this was "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." *Id.* at 1331 (Carnes, J., dissenting from the denial of rehearing *en banc*) (citing Sup. Ct. R. 10(c)). Judge Carnes stated that the question of "whether a district court can [] increase the award beyond that reasonable amount [reflected in the lodestar] based on its finding that the attorney's performance was of superior quality and the results achieved were exceptional" is one that affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party." *Id.* at 1331-32, 1337-39. Judge Carnes summed up the critical importance of this appeal as follows:

> The record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can. It presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the

> enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?

Id. at 1337.

Judge Tjoflat authored a separate dissent from the denial of rehearing *en banc*, reasoning in part that "it can never be appropriate to enhance the attorney's fees in a case seeking injunctive relief on the basis of 'exceptional' or 'superior' results." *Id.* at 1330 (Tjoflat, J., dissenting from the denial of rehearing *en banc*). Judge Tjoflat concluded, "I believe that a lodestar hourly rate that is already at the top of the relevant market is simply ineligible for an additional enhancement." *Id.* at 1330-31. Judge Tjoflat also criticized the enhancement based on the district judge's comparison to other cases over which he had presided as either testimony given *ex parte* and without notice to the State or judicial notice "no less troubling." *Id.* at 1325-27 & n.7.

SUMMARY OF THE ARGUMENT

The statute involved in this case, 42 U.S.C. § 1988, provides that a "reasonable attorney's fee" may be awarded to the prevailing party in certain civil rights actions, including cases brought pursuant to 42 U.S.C. § 1983, like the case at bar. The question presented is whether, after calculating the lodestar –

the reasonable number of hours worked on the case multiplied by reasonable hourly rates that reflect the skill and experience of the timekeepers – a district court then can award an enhancement that allows recovery of additional attorney's fees based on results obtained from the litigation or quality of representation.

This Court should definitively hold that lodestar enhancements based on results obtained or quality of representation are never permitted in cases in which "a reasonable attorney's fee" is sought pursuant to 42 U.S.C. § 1988. Neither the plain statutory language nor the legislative history permits any type of enhancement to an attorney's fee award. In fact, awarding an enhancement on top of the lodestar amount would contradict the plain language of the statute and run counter to Congress' stated intent of avoiding windfalls to attorneys who act as private attorneys general. This Court's prior decisions regarding attorney's fee awards under fee-shifting statutes – *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984); and *Hensley v. Eckerhart*, 461 U.S. 424 (1983) – support a conclusion that results obtained and quality of representation are already subsumed in the twelve "*Johnson* factors" that are used to analyze the reasonableness of an attorney's fee award and therefore should not be used again to enhance the award after it is determined to be reasonable.

Specifically, an enhancement to the lodestar for results obtained would go beyond the fee-shifting statute's purpose of making the plaintiff's counsel whole for vindicating a civil right, discourage broad-based settlements of disputed claims, and give unbridled discretion to district judges to multiply an already reasonable attorney's fee based on a subjective determination that the remedy obtained was somehow more extraordinary than anticipated. Likewise, an enhancement based on quality of representation runs counter to an attorney's pre-existing duty to provide the best possible service to his or her client, disregards the fact that any increased difficulty in representing the client will be reflected in increased hours billed, and ignores the fact that any special skill exhibited by an attorney will be reflected in that attorney's hourly rate. An enhancement for quality of representation is particularly inappropriate where, as in this case, a large number of hours are eliminated from the lodestar as excessive.

In this case, the District Court's application of an indiscriminate multiplier to a fee award based on what the court deemed "excellent" or "exceptional" results and quality of legal representation is entirely inconsistent with the plain language of 42 U.S.C. § 1988, the corresponding legislative history, and this Court's precedent. Accordingly, this Court should reverse the decision of the Court of Appeals for the Eleventh Circuit, which upheld the District Court's

$4.5 million enhancement to the lodestar based on results obtained and quality of representation.

ARGUMENT

The guiding principle of this Court's jurisprudence for determining a reasonable attorney's fee award to a prevailing party pursuant to a federal fee-shifting statute is that a district court must calculate the "lodestar" amount by multiplying the reasonable number of hours worked by attorneys and other appropriate timekeepers on the case by reasonable hourly rates that reflect the skill and experience of the individuals for whom the fee recovery is sought.[6]

[6] Although the only fee-shifting statute applicable in this case is 42 U.S.C. § 1988, this Court has stated that the standards for the shifting of attorney's fees pursuant to federal statutes "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *accord Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *see also Dague*, 505 U.S. at 562 (stating in a case involving the Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6972(e), and the Clean Water Act § 505(d), 33 U.S.C. § 1365(d), that the language of these statutes is "similar to that of many other federal fee-shifting statutes; our case law construing what is a 'reasonable' fee applies uniformly to all of them") (citing *inter alia* 42 U.S.C. § 1988); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 713 (1987) ("*Delaware Valley II*") ("Last Term in [*Delaware Valley I*], we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) [of the Clean Air Act, 42 U.S.C. § 7604(d)] the courts should follow the principles and case law

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See City of Burlington v. Dague, 505 U.S. 557, 562 (1992) ("[T]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence."), *quoted in Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986) ("*Delaware Valley I*"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The question presented in this case is whether, after making the lodestar calculation of reasonable hours multiplied by reasonable rates, a district court can then increase the lodestar by an enhancement that allows recovery of additional attorney's fees based on (1) results obtained from the litigation or (2) quality of representation.

Results obtained and quality of representation are factors that are subsumed in the lodestar calculation and reflected in the reasonable number of hours worked (which necessarily reflects the difficulty of the case) and a reasonable hourly rate (which reflects the attorney's skill and experience). Consequently, Petitioners respectfully submit that these two factors cannot serve to justify an enhancement to the lodestar.

As this Court explained in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247

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governing the award of such fees under 42 U.S.C. § 1988, which provides that in the actions specified in that section 'the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.' ").

(1975), the general rule in the United States is that each litigant bears its own attorney's fees and expenses, and the prevailing party cannot shift those fees and expenses to the opposing party.[7] In *Alyeska*, this Court emphasized the broad application of this general rule absent contrary statutory law, refused to fashion a judicial exception to this general rule, and indicated that it is generally Congress' authority alone to decide under what circumstances the costs of litigation should be shifted from one party to the other.[8] *Id.* at 262 ("[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.").

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[7] This common law rule of each party bearing its own fees and expenses has been termed the "American Rule," which is in contrast to the "English Rule" that reflects centuries-old statutory authorization in that country that, although subject to court discretion, "counsel fees are regularly allowed to the prevailing party." *Alyeska*, 421 U.S. at 247 & n.18.

[8] This Court in *Alyeska* noted its prior precedent recognizing three limited circumstances as appropriately within a court's inherent power to award a reasonable attorney's fee: (1) willful disobedience of a court order, (2) when the losing party acts in bad faith, and (3) as a part of a common fund or property preserved or recovered for the benefit of others. 421 U.S. at 257-58, *cited in Delaware Valley I*, 478 U.S. at 562. None of these circumstances are before this Court. *See Kenny A.*, 454 F. Supp. 2d at 1270-72, *aff'd*, 532 F.3d at 1219, 1232-33 (stating that the District Court "correctly concluded" that application of either the common fund doctrine or the common benefit doctrine "was not legally permissible or even possible").

In response, Congress the next year passed the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"), codified as amended at 42 U.S.C. § 1988, to provide for a "reasonable attorney's fee" award to prevailing parties in civil rights cases. 42 U.S.C. § 1988(b); *see* S. Rep. No. 94-1011, at 4 (1976) ("[I]n *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory. . . . This bill . . . is an appropriate response to the *Alyeska* decision.").

I. The Statutory Language of 42 U.S.C. § 1988 Does Not Provide for an Enhancement to Attorney's Fees for Either Results Obtained or Quality of Representation, and the Legislative History Likewise Does Not Support Such an Interpretation.

The federal fee-shifting statute created by the Act states, in pertinent part, that in any action to enforce a provision of 42 U.S.C. § 1983 (the statute underlying this litigation) and certain other federal statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, *a reasonable attorney's fee* as part of the costs. . . ."[9] 42

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[9] In this case, Plaintiffs did not become prevailing parties by obtaining a judgment on the merits. *See Kenny A.*, 454 F. Supp. 2d at 1269 (referring to the settlement and entry of a

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U.S.C. § 1988(b) (emphasis added). The Act does not provide how the reasonable attorney's fee shall be determined and, importantly, makes no mention of the use of "enhancements," "multipliers," or "bonuses" to fee awards. It certainly says nothing about an enhancement that would increase the fee award beyond the total dollar amount reflected in prevailing counsel's own billing records submitted to the court, as occurred in this case. The statutory language simply provides that a "reasonable" fee shall be provided, and there is no indication from either the statute itself or the legislative history that any type of enhancement can be added to a fee award based on results obtained or quality of representation. In fact, the intent of Congress appears to contemplate that no enhancement in excess of an already determined reasonable fee can be awarded because such an increase would constitute a windfall to the prevailing party's counsel.

To the extent that the legislative history is instructive, it indicates that the clear purpose of the

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consent decree). Nevertheless, they are entitled to a "reasonable attorney's fee" as provided in the statute because the parties settled the litigation, and the District Court entered a consent decree. This Court has held that a party that obtains a consent decree is a "prevailing party" for purposes of 42 U.S.C. § 1988. *See Maher v. Gagne*, 448 U.S. 122, 128-30 (1980), *cited in Buckhannon Bd. & Care Home*, 532 U.S. at 604 ("In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees.").

legislation which became the Act (S. 2278) was to attract competent counsel without providing windfalls to attorneys. *See* H. Rep. 94-1558, at 9 (1976) ("The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys."); S. Rep. 94-1011, at 6 (1976) (noting the importance of attracting competent counsel without providing windfalls); 122 Cong. Rec. 35127 (1976) (statement of Sen. Jordan) ("This is not a bill that we could term a food-stamp bill for lawyers. It is not going to work that way."); 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy) ("If the proponents of this bill were interested in creating a relief fund for lawyers, they would surely have gone about it in a different fashion. No, this bill is not for the purpose of aiding lawyers."). The intent to avoid windfalls is further underscored by the statement in the Senate Report that "citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court," and "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably *expended* on a matter.'" S. Rep. 94-1011, at 2, 6 (1976) (emphasis added) (quoting *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974)).

The House Report to the Act, in discussing "[r]easonable fees" as a "principal element" of the bill, states that "[t]he courts have enumerated a number

of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions" including, "for example," *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in which "the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any."[10] H. Rep. 94-1558, at 8 (1976). The report then

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[10] The particular fee-shifting statute at issue in *Johnson* was Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), as amended. 488 F.2d at 715-16. The twelve *Johnson* factors are as follows:

(1) time and labor required;

(2) novelty and difficulty of the questions;

(3) skill requisite to perform the legal service properly;

(4) preclusion of other employment by the attorney due to acceptance of the case;

(5) customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) amount involved and results obtained;

(9) experience, reputation, and ability of the attorneys;

(10) "undesirability" of the case;

(11) nature and length of the professional relationship with the client; and

(12) awards in similar cases.

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immediately discounts at least one of the *Johnson* factors (the amount received in damages) by emphasizing that fee recovery ordinarily should be provided in civil and constitutional rights cases even if damages are not recovered, such as injunctive relief cases. *See id.* at 8-9; *Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986). The Senate Report similarly references *Johnson* as providing examples of "appropriate standards," and it – but not the House Report – then cites three district court decisions as correctly applying them. *See* S. Rep. 94-1011, at 6 (1976) (citing *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)).[11]

See 488 F.2d at 717-19. The Fifth Circuit adopted these factors from the American Bar Association's Code of Professional Responsibility. *See id.* at 719. (These factors, reordered as eight factors but generally stated similarly, are currently Rule 1.5(a) of the ABA's Model Rules of Professional Conduct.)

[11] In *Stanford Daily*, the court found no grounds to reduce the 750 hours claimed by the plaintiffs' counsel, found $50 per hour to be a reasonable rate, and increased the base figure of $37,500 by $10,000 (or about 27%) due to "the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation." 64 F.R.D. at 683, 685, 688.

In *Davis*, the court set the attorneys' compensated rates between $35-$60 per hour, reduced the award by $1,000 for "unnecessary duplication of effort," and added a "result charge" of nearly $7,200 to the roughly $40,000 attorney's fee award, or about an increase of 18%, because the plaintiffs' counsel

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This Court has referenced the Senate Report's citation of the three district court cases in varying ways depending upon the specific issue before the Court, but has never stated that these cases are determinative of congressional intent with respect to whether fee awards can be increased above the lodestar depending upon one or more of the *Johnson* factors. *See Blanchard v. Bergeron*, 489 U.S. 87, 91-93 & n.6 (1989) (noting that the legislative history suggests a prior contingent fee arrangement "is but a single factor and not determinative"); *Delaware Valley II*, 483 U.S. at 724-25 ("[T]he legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits."); *Blum*, 465 U.S. at 893-95 & n.9 (commenting that the use of prevailing market rates to determine reasonable fees is consistent with the intent of Congress); *Hensley*, 461 U.S. at 430-32 & n.4 (stating that the legislative history "does not provide

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"achieved excellent results for the plaintiffs and the represented class." 8 Empl. Prac. Dec. (CCH) ¶ 9444.

Swann lists nine "pertinent factors" in arriving at a reasonable attorney's fee, including the factors of "results obtained," which the court found were "excellent," and "[r]eputation, experience and ability of plaintiffs' counsel," which the court found were "exceptional." 66 F.R.D. at 484, 486. The amount awarded was 14% less than the amount requested by the plaintiffs, based on the court's explanation that it "prefer[red] to err on the conservative side in dealing with any fee question because" it did "not wish to contribute unnecessarily to the overpricing of litigation in this or any other court." *Id.* at 486.

a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success").

Given Congress' admonition against windfalls in both the House and Senate Reports, it would be incongruous to attribute much weight to the Senate Report's citation of the three district court decisions because, read together, they are at best inconclusive as to whether the use of multipliers for results obtained and quality of representation was intended by Congress in any situation. *See generally United States v. Seeger*, 380 U.S. 163, 177 (1965) (questioning the value of a parenthetical citation in a Senate Report "which might stand for a number of things," in contrast to "an explicit statement of congressional intent," which would deserve more weight). Indeed, the explicit statement of congressional intent that the Act was passed to attract competent counsel *without providing windfalls to attorneys* surely deserves more weight than citations to cases issued between the date of the *Johnson* decision in January 1974 and passage of the Act in October 1976. *See* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976).

Johnson included quality of representation and results obtained with other factors for consideration in arriving at a "reasonable" fee, but it did not suggest that this resulting fee be again multiplied by some unspecified percentage through another application of one or more of these same factors, nor did

the *Johnson* decision itself actually do so.[12] *See* 488 F.2d at 717-20. Such double counting would appear to result in the very "windfall" that Congress was expressly disavowing in its enactment of 42 U.S.C. § 1988. *See Dague*, 505 U.S. at 562-63; *Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. In fact, *Johnson* was concerned with ensuring that the appropriate market rates were provided to counsel. 488 F.2d at 717 (stating that the hourly rates did not "match the minimum fee scale in Atlanta, Georgia," and, although "the award was supposedly considered in light of the Atlanta community practices," there was no differentiation made "between the experienced and the non-experienced attorneys"); *see also Blum*, 465 U.S. at 894 ("In all four of the cases cited by the Senate Report [including *Johnson*], fee awards were calculated according to prevailing market rates.").

Moreover, one of the district court decisions cited in the Senate Report actually *reduced* the fee award notwithstanding the court's express findings that the quality of representation was "exceptional" and that the results obtained were "excellent and constituted the total accomplishment of the aims of the suit." *Swann*, 66 F.R.D. at 484, 486. Another of the district court decisions increased the base award, in part because of the case's contingent nature, which this

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[12] This Court has long held that the *Johnson* factors are generally subsumed in the lodestar. *See Delaware Valley I*, 478 U.S. at 564-65; *Blum*, 465 U.S. 898-900 & n.16; *Hensley*, 461 U.S. at 434 n.9.

Court later held to be improper in *Dague*, 505 U.S. at 567.[13] *See Stanford Daily*, 64 F.R.D. at 684-86. Indeed, this statement from *Johnson* reflects the overall policy goal that Congress sought to implement with the Act:

> *[C]ourts must remember that they do not have a mandate under Section 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys* but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation.

488 F.2d at 719 (emphasis added).

The Court itself has addressed these cases in proper context by explaining how the methods for calculating a reasonable attorney's fee have changed over the years. Notwithstanding that by the early 1970s hourly billing had become widespread, "[t]he federal courts did not swiftly settle on hourly rates as the overriding criterion for attorney's fee awards." *Gisbrecht*, 535 U.S. at 801. In fact, the *Johnson*, *Stanford Daily*, *Davis*, and *Swann* decisions were

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[13] The dollar values of the enhancements awarded in *Stanford Daily* ($10,000) and *Davis* ($7,200) also pale in comparison to the enhancement that was awarded in this case ($4.5 million).

issued in 1974-75, either before, or just as, the emphasis on a lodestar calculation of hours multiplied by hourly rates was beginning to gain a "firm foothold," and the lodestar finally achieved dominance only after the Court's 1983 decision in *Hensley*. *Gisbrecht*, 535 U.S. at 801. Since then, however, "the 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence" and "holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation." *Id.* at 801-02 (quoting *Dague*, 505 U.S. at 562, and citing *Hensley*, 461 U.S. at 440 (Burger, C.J., concurring)).

Because the Act was passed in response to the Court's decision in *Alyeska*, and based on the timing of that passage, the most reasonable interpretation is that the district court cases in the Senate Report were cited to emphasize that fee awards would again be available for civil rights actions in generally the same manner as in prior court decisions:

> This bill . . . is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.
>
> * * *

> This bill creates no startling new remedy – *it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision.*

S. Rep. No. 94-1011, at 4, 6 (1976) (emphasis added).

Ultimately, the Act simply provides for a "reasonable attorney's fee," and all one can discern from the legislative history is that Congress' purpose in passing the Act was to provide for competent counsel without authorizing them to obtain a fee windfall. 42 U.S.C. § 1988(b); *see* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976). The legislative intent of attracting competent counsel without providing a windfall is fully realized when an attorney for a prevailing party is awarded attorney's fees for the amount of work that he or she *actually* and *reasonably* provided. The awarding of an enhancement on top of an award of reasonable hours times reasonable rate, as was done in this case, flies in the face of the plain language of the Act and is contrary to the explicit intent of Congress.

II. The Court's Prior Attorney's Fees Decisions Support the Conclusion That a Lodestar Enhancement Should Not Be Allowed for Results Obtained or Quality of Representation.

The Court's decisions that discuss whether an enhancement to a fee award should be permitted for results obtained or quality of representation have evolved as follows: (1) in its first decision, *Hensley*, generally indicating that enhancements may be supportable in certain circumstances notwithstanding the fact that an actual enhancement award was not before the Court, (2) in later decisions in *Blum* and *Delaware Valley I*, finding enhancements unwarranted in specific circumstances but not forbidding enhancements completely, and (3) in *Delaware Valley II* and *Dague*, addressing a particular *Johnson* factor which is similar to results obtained – the contingent nature of the case – and definitively concluding in *Dague* that enhancement is never permissible for that factor. As one of the Circuit Judges in this case characterized this history, "[s]uggestion has been followed by retrenchment, resulting in a decisional arc that bends decidedly against enhancements." *Kenny A.*, 532 F.3d at 1221 (Carnes, J., concurring).

A. *Hensley v. Eckerhart:* Establishment of the Lodestar With the Possibility of an Adjustment.

The *Hensley* decision in 1983 was the first time the Court interpreted what § 1988 contemplates by

the term "a reasonable attorney's fee" and, in doing so, adopted the lodestar method of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" as the proper basis for calculating fees in fee-shifting cases.[14] 461 U.S. at 433-34 & n.7. The Court referred to this calculation as "[t]he most useful starting point for determining the amount of a reasonable fee," but noted that this "does not end the inquiry" because "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Id.* at 433-34. Although the Court in *Hensley* cited no case law for this proposition, this language regarding the possibility of an enhancement in some cases of exceptional success appears to arise from the Third Circuit's decisions in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 108, 112-18 (3d Cir. 1976) ("*Lindy II*"), and 487 F.2d 161, 166-69 (3d Cir. 1973) ("*Lindy I*"); *see also Delaware Valley I*, 478 U.S. at 563-64 (citing *Lindy I*, *Lindy II*, and *Johnson* for what the Court termed the "hybrid" approach it adopted in *Hensley*).[15]

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[14] Prior to *Hensley*, one Justice of the Court had cited *Johnson* in a footnote to a concurring opinion discussing use of the lodestar analysis in a Title VII case. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 365 & n.3 (1981) (Powell, J., concurring).

[15] Importantly, *Lindy* was actually a common fund case in which fees were recovered from the plaintiffs' counsel's own clients based on *quantum meruit* (*see Lindy II*, 540 F.2d at 119-20, 122; *Lindy I*, 487 F.2d at 165-66), rather than shifting of

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attorney's fees to the opposing party, and this Court has suggested that the standards applicable to such common fund cases (and the possibility for fee recovery in excess of the lodestar) are not equally applicable to fee-shifting cases. *See Blum*, 465 U.S. at 900 n.16 ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation."); *cf. Delaware Valley I*, 478 U.S. at 562 n.6 (noting the existence of common fund recovery and its inapplicability in a fee-shifting case).

> Courts have traditionally determined the amount of common fund fee awards by considering several factors, especially the size of the fund, and frequently have based awards on what they consider a reasonable percentage of the fund. In the early 1970s, courts began moving away from this practice and toward the lodestar method. *However, in the 1980s two developments sparked reconsideration of the lodestar in common fund cases. First, in a footnote in* Blum v. Stenson, *the Supreme Court distinguished between the calculation of fees under fee-shifting statutes and calculation under the "'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class."* Second, in 1985, a Third Circuit task force on attorneys' fees recommended the percentage method in common fund cases.

Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 72 & n.361 (Fed. Judicial Ctr. 2d ed. 2005) (citing *Lindy I* as the "seminal case" for consideration of the lodestar in common fund cases) (footnotes omitted). In addition, the *Lindy* decisions approved an adjustment for contingency, which this Court has since held is impermissible, *see Dague*, 505 U.S. at 567. Therefore, any continued reliance on *Lindy* for the proposition that enhancements may be appropriate in fee-shifting cases appears unfounded.

Hensley, however, presented no issue of an upward enhancement having been made by the district court. The adjustment issue actually presented in *Hensley* was whether attorney's fees should be *reduced* for those plaintiffs who achieve only partial or limited success, and the Court held that fees should indeed be reduced by the amount spent on distinct, unsuccessful claims. *See Hensley*, 461 U.S. at 426, 434-37, 440 ("The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims."). It was in this context that the Court discussed the importance of the "results obtained" factor, stating that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440. The *Hensley* opinion, nonetheless, does contain dicta recognizing the *possibility* of an enhancement for results obtained, despite the issue not being before the Court: "[I]n some cases of exceptional success an enhanced award *may be* justified" even though excellent results will normally be encompassed by all hours reasonably expended on the litigation. *Id.* at 435 (emphasis added).

B. *Blum v. Stenson:* Quality of Representation and Results Obtained Are Generally Reflected in the Lodestar So That an Upward Adjustment Is Usually Impermissible.

In the following term, this Court decided *Blum*, which was the first time that the Court, in construing § 1988 and the dicta in *Hensley*, was presented with a case in which the district court had actually enhanced a fee award. 465 U.S at 891. The district court in *Blum* had enhanced the lodestar figure by 50% based on a number of the same factors identified in *Johnson*, specifically "the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to a large class' that was achieved." *Id.* The Court repeated *Hensley*'s statement that "in some cases of exceptional success an enhanced award may be justified," but emphasized immediately thereafter that when "the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable," the lodestar amount "is presumed to be the reasonable fee contemplated by § 1988." *Id.* at 897. The Court then stated that "[t]he issue remaining is the appropriateness of an upward adjustment to the fee award in this case" and held that awarding the enhancement was an abuse of the district court's discretion. *Id.* at 898-902.

This Court rejected each of the district court's four *Johnson*-based justifications for the enhancement. As to the novelty and complexity of the issues presumably being reflected in the lodestar, the Court

emphasized that, even where the experience and special skill of an attorney may result in fewer hours expended on an otherwise novel or complex issue, that attorney's special skill and experience "should be reflected in the reasonableness of the hourly rates." *Id.* at 898. "Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award." *Id.* at 898-99. Quality of representation, the Court held, "generally is reflected in the reasonable hourly rate" and "*may* justify an upward adjustment *only* in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899 (emphasis added). Absent this especially rare efficiency, "an upward adjustment for quality of representation is a clear example of double counting." *Id.* Regarding the district court's determination that the ultimate outcome of the litigation "was of great benefit to a large class of needy people," the Court classified this statement as falling within the "results obtained" factor and, in an apparent break with the dicta in *Hensley*, said, "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Id.* at 900. The Court also emphasized in a footnote to that sentence:

> Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under § 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, *a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation*. Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.

Id. at 900 n.16 (emphasis added).

Importantly for purposes of this case, the Court in *Blum* left more open the possibility for an upward adjustment based on contingency than the other factors of results obtained, quality of representation, and novelty and complexity of the case, because it left for future decision whether contingency could ever justify a lodestar enhancement.[16] *Id.* at 901 n.17 ("We have no occasion in this case to consider whether the

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[16] In a concurring opinion, Justice Brennan directly addressed the contingency issue, reaffirming his opinion in *Hensley* that "Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee," citing *Johnson* and *Stanford Daily* as support. *Blum*, 465 U.S. at 902-03 (Brennan, J., concurring in part and dissenting in part) (citing *Hensley*, 461 U.S. at 448-49).

risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment."). The Court simply stated that "we cannot be sure what prompted the [district] court's statement" because the record failed to identify any specific risks to counsel. *Id.* at 901. Based on its analysis, the Court vacated the portion of the district court's order enhancing the fee award. *Id.* at 901-02.

C. *Pennsylvania v. Delaware Valley:* Quality of Performance and Results Obtained Should Not Justify Enhancement of the Lodestar, Particularly When a Large Number of Attorney Hours Are Eliminated As Unnecessary.

In *Delaware Valley I*, the Court further narrowed the application of the *Johnson* factors and stated that "most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" are included within the lodestar figure. 478 U.S. at 566. The district court in *Delaware Valley* enhanced the plaintiffs' fee award because of the contingent nature of the case, the "quality of the work performed and the results obtained . . . which culminated in an outstanding result." *Id.* at 555 (citation omitted). In reviewing the district court's reasons for enhancing the fee award, the Court found all of them insufficient, just as it had in *Blum*.

Going beyond its statement in *Blum* that a "presumption" exists that the lodestar represents the reasonable fee, 465 U.S. at 897, in *Delaware Valley I*, the Court stressed that it is a "strong presumption," 478 U.S. at 565. The Court explained that this "strong presumption" that the lodestar figure represents a "reasonable" fee is wholly consistent with the rationale behind fee-shifting statutes. *Id.* ("These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client.").

The Court then appeared to indicate that a number of the *Johnson* factors that prior decisions might have left open as a possible basis for enhancement in certain exceptional cases were no longer available, stating explicitly that the strong presumption against enhancements cannot be overcome by "the special skill and experience of counsel," the "quality of representation," or the "results obtained." *Id.* (citing *Hensley*, 461 U.S. at 435, and *Blum*, 465 U.S. at 897, 899). The Court stated that, because these factors "are presumably fully reflected in the lodestar amount," they "*cannot* serve as independent bases for increasing the basic fee award."[17] *Id.* (emphasis added).

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[17] Properly read, *Delaware Valley I* should have closed the door on enhancements based on results obtained or quality of representation. Indeed, Justice Blackmun's dissent reflects this reading of the decision by stating that the majority opinion

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According to the Court, when an attorney first agrees to take on a representation, "he obligates himself to *perform to the best of his ability* [*e.g.*, quality of representation] and to *produce the best possible results* [*e.g.*, results obtained] commensurate with his skill and his client's interests." *Id.* (emphasis and brackets added). Consequently, the accounting for these factors in the lodestar calculation of the reasonable number of hours multiplied by a reasonable hourly rate "adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance." *Id.* at 565-66. To enhance the fee for overall quality of performance and, by extension, results obtained risks the "danger of 'double counting.'" *Id.* at 566.

This Court reversed the district court's application of a multiplier for quality of representation and results obtained. *Id.* at 568. Notably – and relevant to the facts in this case where the lodestar was reduced more than $1 million for excessive billing and then

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makes it now "virtually impossible for a plaintiff to meet" the standard for an enhancement. *Delaware Valley I*, 478 U.S. at 569 (Blackmun, J., dissenting). Nonetheless, as this case shows, federal judges have not always read the Court's *Delaware Valley I* opinion so strictly. *See Kenny A.*, 454 F. Supp. 2d at 1288 (recognizing from *Delaware Valley I* that most of the factors relevant to calculating a reasonable fee award "*cannot* serve as independent bases for increasing the basic fee award," but then relying on the previously decided *Blum* opinion to conclude that "*[n]evertheless*, upward adjustments of the lodestar figure are still permissible" in rare cases) (emphasis added and citations omitted).

increased by a $4.5 million enhancement for quality of representation and results obtained, *see Kenny A.*, 454 F. Supp. 2d at 1270, 1286, 1290 – the Court recognized that excessive billing which leads to a reduction in the lodestar calculation cannot then support an enhancement for superior quality of representation. *See Delaware Valley I*, 478 U.S. at 566-67 ("The District Court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'").

On the separate issue of whether basing the enhancement on the contingent nature of the fee was proper (perhaps again showing that contingency was a more nettlesome factor to preclude an enhancement than results obtained or quality of representation), the Court ordered reargument. *See id.* at 568; *see also Blum*, 465 U.S. at 901 n.17. The answer to this question following reargument ultimately resulted in no majority decision. *See Delaware Valley II*, 483 U.S. at 723-31 (plurality opinion).

D. *City of Burlington v. Dague:* Enhancements for Contingency Are Never Permitted.

The question left open by *Delaware Valley II* was resolved definitively by the Court in *Dague*, where it rejected the proposition that a court "may enhance the fee award above the 'lodestar' amount in order to

reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services." 505 U.S. at 559.

In reasoning that an enhancement for contingency would substantially duplicate factors already considered in the lodestar, the Court explained that the risk of loss is the product of two factors: "(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *Id.* at 562. The Court said that the first factor "should play no part in the calculation of the award" because otherwise there always would be risks affecting the lodestar, and the lodestar consequently could never be the final calculation.[18] *Id.* at 563. Such a result would contradict the "strong presumption" that the lodestar is the proper fee award. *Id.* at 562 (citing *Delaware Valley I*, 478 U.S. at 565).

As to the second factor, the Court said the difficulty of establishing the merits of a case is generally already included in the lodestar, either in the higher hourly rate of an attorney "skilled and experienced enough" or in the number of hours expended. *Id.* The difficulty of establishing the merits thus would seem to encompass, or at least relate to, results obtained

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[18] The Court reasoned that awarding enhancements based on the financial risk of taking a case would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." *Dague*, 505 U.S. at 563.

and quality of representation, and, supporting this inference, the Court stressed that an enhancement for contingency "would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.* As it had warned in *Blum* and *Delaware Valley I*, taking account of such factors again through enhancement "amounts to double counting." *Id.* at 563; *see Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. In short, neither the "relative merits of the claim" nor "the difficulty of establishing those merits" should serve as the basis for multiplying a fee award, and the Court accordingly concluded that "no contingency enhancement whatever is compatible with the fee-shifting statutes at issue."[19] *Dague*, 505 U.S. at 562-63, 565.

Beginning with *Hensley* and concluding with *Dague*, the Court has progressively underscored the lodestar's importance while eliminating or limiting

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[19] The Court also noted that awarding such enhancements would make attorney's fee awards even more complicated and would prolong litigation:

> And finally, the interest in ready administrability that has underlain our adoption of the lodestar approach, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation"), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.

Dague, 505 U.S. at 566 (quoting *Hensley*, 461 U.S. at 433, 437).

those factors which could support an enhancement to the lodestar.

III. No Lodestar Enhancement Should Be Permitted for Results Obtained.

A. The Circuit Court's Decision Affirming the District Court's Award of an Enhanced Fee for Results Obtained Is Contrary to *Delaware Valley I* and *Dague*.

This Court should hold definitively that lodestar enhancements based on results obtained are never permitted in cases in which "a reasonable attorney's fee" is sought pursuant to 42 U.S.C. § 1988. Applying an indiscriminate multiplier to a fee award for obtaining an "excellent" or "exceptional" result is inconsistent with the spirit if not the letter of the Act and this Court's precedent, runs counter to notions of fairness, and leads to anomalous results.

First, the reference to the importance of results obtained comes from *Hensley*, a case in which the actual issue was whether fees should be *reduced* based on "results obtained" related to unsuccessful claims. 461 U.S. at 426, 434-37, 440. For cases in which there are no such unsuccessful claims, it is common sense that a full lodestar award based on reasonable hours multiplied by a reasonable rate should wholly compensate an attorney for all the effort he or she has put into the case. *See id.* at 435 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.").

Such a rule also comports with the legislative history underlying § 1988. *See* S. Rep. 94-1011, at 2 (1976) (providing that citizens should recover *what it costs* for counsel, and their counsel should be paid for their time reasonably *expended*). A fee that exceeds reasonable hours times reasonable rates provides an unauthorized windfall. *See* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976). Multiplying an award to compensate for results obtained is as inconsistent with congressional intent as an enhancement based on contingency, which this Court has forbidden. *See Dague*, 505 U.S. at 565 ("First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss.") (citing *Delaware Valley II*, 483 U.S. at 719-20, 724-25, and *Hensley*, 461 U.S. at 424). In such a situation, the attorney would recover more fees than are accounted by the time that attorney reasonably spent on the litigation. *See id.* Public attorneys general do not receive windfalls for protecting the public interest. The same should be true for private attorneys general. *See Johnson*, 488 F.2d at 719 (stating that fee-shifting "should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general").

Second, as with the risk of loss or, more appropriately stated here, likelihood of success, the fundamental components of results obtained in litigation

are the quality of counsel and the merits of the case. Any difficulty in overcoming unfavorable facts or difficult precedent affecting the merits of the case would fall within the "novelty [and] complexity of the issues" and/or the amount of hours that counsel is required to expend – items that are wholly subsumed in the lodestar. *See Blum*, 465 U.S. at 898. Moreover, any additional effort that an attorney must expend to respond to the opposition's vigorous defense will be reflected in the hours spent on the case, and this Court has stated, in construing the Title VII fee-shifting statute, that "[a] fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978). An enhancement for results obtained necessarily constitutes double counting that yields a fee award in excess of the actual work put into the case. *See Dague*, 505 U.S. at 562-63; *Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. Indeed, "results obtained" is one of several factors that are part and parcel of the entire litigation and are little more than reflections of the lodestar itself. *Cf. Pierce v. Underwood*, 487 U.S. 552, 573 (1988) (stating, in an Equal Access to Justice Act case, that factors such as "results obtained," "novelty and difficulty of issues," and "work and ability of counsel" "are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are").

Third, this Court has already held that whether the results obtained are of far-reaching significance

should not provide grounds for an enhancement. *See Blum*, 465 U.S. at 900 n.16. The purpose of fee-shifting statutes such as § 1988 is "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Delaware Valley I*, 478 U.S. at 565. By "seeking redress," the Act did not expressly state or imply that fees should be increased based upon the quantum of redress obtained. A fee award "should be calculated in a way that furthers the purpose of the fee-shifting statutes; they should not be used to encourage or reward results that go beyond that purpose." *Kenny A.*, 532 F.3d at 1230 (Carnes, J., concurring) (citing *Blum*, 465 U.S. at 893-95).

Fourth, there frankly is an underlying candor problem built into a system that provides enhancements for results obtained which (1) puts a plaintiff's attorney in the position of arguing conflicting positions during the merits stage of the litigation compared with the attorney's fees stage and (2) forces a defense attorney either to concede the strength of plaintiff's case in order to argue the results were not unexpected or instead insist victory was an anomaly and then possibly be saddled with a "results obtained" enhancement. *Cf. Delaware Valley II*, 483 U.S. at 721-22 ("First, evaluation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case,

and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or 'allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish.'") (citation omitted). Indeed, throughout this litigation, Plaintiffs contended that the unconstitutionality of the State's foster care policies was a foregone conclusion, even to the point of challenging the State's mere filing of a motion for summary judgment as an "extraordinary decision." (J.A. at 38 ¶ 20.) However, in their fee application after settlement, Plaintiffs' counsel suddenly contended they had achieved extraordinary results by asserting some "novel" claims in an area of the law that was "unsettled." (Br. Supp. Pls.' Application for Attorney's Fees [Dkt. 495] at 12, 24.) The State, on the other hand, endeavored to defend its policies prior to mediation, then agreed to a comprehensive settlement without regard to whether the "results obtained" would be deemed better or worse than the District Court would have ordered if the case proceeded to a trial and the State had lost.

Finally, an enhancement to the lodestar based on results obtained flies in the face of the rationale which led the Court to bar enhancements for contingency in *Dague*, where the Court decided that the relative merits of a claim "should play no part in the calculation of the [fee] award." 505 U.S. at 563. If the legal and factual merits of the claim, or the difficulty in establishing those merits, are not grounds for enhancement, *id.* at 562-63, then it strains credibility

to argue that an enhancement nevertheless may be awarded when the case is determined to have merit and a particular remedy is ordered. Whether that remedy is considered modest or extensive, the party has prevailed and its rights have been redressed, which is what the "reasonable fee" award authorized by § 1988 is meant to accomplish. No additional bonus or multiplier is necessary to achieve the purpose of the Act.

B. The District Court's Award of an Enhancement for Results Obtained Was an Abuse of Discretion and Operated to Punish Georgia's Officials for Agreeing to a Broad-Based Settlement of Plaintiffs' Claims.

This case demonstrates exactly why lodestar enhancements based on results obtained should not be permitted. The District Court characterized "plaintiffs' success in this case [as] truly exceptional" by stating that the "centerpiece" of the success "is a series of thirty-one outcome measures that *State Defendants have agreed to meet* and sustain for at least three consecutive six-month reporting periods." *Kenny A.*, 454 F. Supp. 2d at 1289 (emphasis added). The court also emphasized that the "Consent Decree provides *sweeping relief* to the plaintiff class" and that, in fifty-eight years as a practicing attorney and judge, the district judge had never seen "such a favorable result on such a *comprehensive scale*." *Id.* at 1289-90 (emphasis added). In short, the District

Court gave a "results obtained" enhancement for what it viewed as far-reaching significance and "sweeping relief" to a large class of persons, contrary to this Court's precedent explicitly stating that such grounds are an improper basis for an enhancement. *See Blum*, 465 U.S. at 900 n.16 ("Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under § 1988.").

It cannot be stressed enough that this case was settled, and the State's willingness to agree to settlement, not obstinate conduct, made Plaintiffs prevailing parties. Indeed, it takes two to tango. When the Consent Decree was entered, the District Court concluded that "[i]t is a tribute to all concerned that such a just settlement was consummated." (Dkt. 486 at 14.) Additionally, there are many reasons why parties (especially governments with changing administrations and officials) settle cases, and it should never be presumed that a party has settled because it was overwhelmed by opposing counsel. *See Pierce*, 487 U.S. at 568 ("Respondents contend that the lack of substantial justification for the Government's position was demonstrated by its willingness to settle the litigation on unfavorable terms. Other factors, however, might explain the settlement equally well – for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold

otherwise would not only distort the truth but penalize and thereby discourage useful settlements."). The District Court's decision penalized the State for actually coming to the table and negotiating a settlement with Plaintiffs.[20]

The enhancement went well beyond making Plaintiffs' counsel whole. Rather, the $4.5 million enhancement constituted an increase of $3.5 million above what even Plaintiffs' counsel claimed that they expended on the case. *See Kenny A.*, 454 F. Supp. 2d at 1270. If the District Court's award of an enhancement is allowed to stand, the message to governments and their officials who have to defend claims under 42 U.S.C. § 1983 will be clear: If a government official settles the case for a result that the court later determines is "exceptional," then the official risks an enhanced award of attorney's fees

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[20] The District Court also indicated that if the parties failed to settle and Plaintiffs would have prevailed at trial, "it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." *Kenny A.*, 454 F. Supp. 2d at 1289-90. By awarding an enhancement for such a result, the District Court effectively punished Georgia's officials for entering into a broad-based settlement. Indeed, when considering whether to approve the settlement, the District Court was obligated to decide whether the proposal, taken as a whole, was "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). It was inconsistent on the one hand for the District Court to approve a settlement as "reasonable" and then, on the other hand, to award an enhanced fee based on a determination that the settlement was beyond anything the District Court would have ordered.

against the government. If, however, the official decides to roll the dice and proceed to trial, then a negative judgment may result in a more modest remedy and a lower fee award.

Moreover, enhancements in cases such as this one provide no standards by which a litigant can measure the risks or potential dollar value of a judgment that may be entered against it. The lodestar was an attempt to provide structured guidance to the federal courts. *See Gisbrecht*, 535 U.S. at 801-02; *Delaware Valley I*, 478 U.S. at 562-63. This Court has explained that the main fault of the *Johnson* mode of analysis "was that it gave very little actual guidance to district courts." *Delaware Valley I*, 478 U.S. at 562-63. It is no less true when those same factors are used to *enhance* fee awards. "Setting attorney's fees by reference to a series of sometimes subjective factors place[s] unlimited discretion in trial judges and produce[s] disparate results." *Id.* at 563.

The use of the multiplier is a single factor that can drastically change the presumptively reasonable fee, with no clear standards for doing so. District courts today are expected to calculate the lodestar carefully, but those requirements are of no real force if the courts can then trump them to the effect of a $4.5 million increase with mere vague, subjective

statements that the results obtained were "exceptional."[21] *Kenny A.*, 454 F. Supp. 2d at 1289.

The astonishing $4.5 million enhancement in this case resulted from one district judge's conclusion that the amorphous "results obtained" were somehow "exceptional," when many other judges might have found such results not out of the ordinary at all. *Kenny A.*, 454 F. Supp. 2d at 1289. Petitioners respectfully submit that this Court has a supervisory duty over the district courts to prevent such disparate results in the fair and orderly administration of justice. *See Delaware Valley I*, 478 U.S. at 563.

IV. No Lodestar Enhancement Should Be Permitted Based on Quality of Representation.

A. The Circuit Court's Decision Affirming the District Court's Award of an Enhanced Fee for Quality of Representation Is Contrary to *Delaware Valley I*.

This Court should also state definitively that lodestar enhancements based on "quality of representation" are inappropriate in cases in which "a

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[21] Regardless of how often enhancements actually occur, "an arbitrary or unjust result is no less so for its rarity. Furthermore, the difficulties created by this type of enhancement will arise not only when the enhancement is granted, but also whenever it is sought." *See Delaware Valley II*, 483 U.S. at 732 (O'Connor, J., concurring).

reasonable attorney's fee" is sought pursuant to 42 U.S.C. § 1988. This Court already stated in *Delaware Valley I* that quality of representation "cannot serve as [an] independent bas[i]s for increasing the basic fee award" because this factor is "presumably fully reflected in the lodestar amount." 478 U.S. at 565. If that was not a clear enough statement, the Court went on to conclude that "it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Id.* at 566.

Nevertheless, district courts like the one below have continued to enhance lodestars for quality of representation because of this Court's statement in *Blum* that, although quality of representation "generally is reflected in the reasonable hourly rate," an upward adjustment may be justified "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" 465 U.S. at 899; *see, e.g.*, *Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008) (affirming attorney's fee enhancement on grounds *inter alia* that "it is extraordinarily difficult to actually obtain a jury verdict for the plaintiff in a civil rights case"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 745-46 (6th Cir. 2005) (citing *Blum* in affirming enhancement because of "immense skill requisite to conducting this case properly"). Although the Court has never disavowed this statement in *Blum* and has

not explained what rare case would provide the basis for a "quality of representation" enhancement, its holding in *Delaware Valley I* would appear to limit further, if not implicitly reject, the statement in *Blum*.

Petitioners submit that quality of representation is an inappropriate basis for an enhancement. It is a lawyer's duty always to provide the best service possible, and that duty should not serve as the basis for a financial windfall above what the lawyer would normally earn if he or she performs at an expected superior level. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.1, 1.3 & 1.3 cmt. 1 (2008).

> [W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.

Delaware Valley I, 478 U.S. at 565. Indeed, the correct way to recognize an attorney's performance is in setting the hourly rate, which is concrete, definable, and comparable, rather than enhancing the lodestar, which is amorphous and lacking in clear standards.

Blum provides that one cannot receive an enhancement for special skill with novel and complex issues. 465 U.S. at 898 (emphasizing that, even where the experience and special skill of an attorney may result in fewer hours expended on an otherwise novel or complex issue, that attorney's special skill and experience "should be reflected in the reasonableness of the hourly rates"). If special skill and experience to handle novel and complex cases is off the table as a basis for an enhancement, then a "quality of representation" enhancement arguably can only mean a case in which an attorney performs work significantly superior to that to be expected of those with a similar level of experience in a most efficient manner in a short period of time. However, "time limitations imposed by the client or the circumstances" is one of the *Johnson* factors that should be subsumed within the lodestar and used to determine a reasonable hourly rate. *See Johnson*, 488 F.2d at 718.

Attorney's fees applications by prevailing parties in fee-shifting cases are made at the end of the litigation, and counsel for the prevailing party can always argue as a part of the lodestar calculation why he or she should obtain a higher hourly rate in the litigation than the customary rate he or she charges in other cases. *See Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) (stating that current rates may be submitted in fee applications). After all, the attorney already knows how much time and effort was devoted to the case. Presumably then, counsel for a prevailing party will always submit a request for a rate that

adequately compensates him or her for services performed.[22] *See Kenny A.*, 547 F.3d at 1331 (Tjoflat, J., dissenting from the denial of rehearing *en banc*) (stating that counsel themselves pick hourly rates that they feel will adequately compensate them).

Enhancements based on quality of representation provide no clear standards, in contrast to the more concrete, definable, and comparable longstanding method of taking quality into account when setting hourly rates. "We have found it all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop." *Donnell v. United States*, 682 F.2d 240, 254 (D.C. Cir. 1992).

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[22] In its discussion of the enhancement sought in *Blum*, the Court noted that "[n]ot only has respondent failed to show that the hourly rates failed to provide a reasonable fee for the quality of representation provided, but she candidly concedes that the 'fees awarded [to her attorneys] may be at the upper end of the market for awards under § 1988. . . .'" 465 U.S. at 900 (citation omitted). In this case, even the District Court noted that Plaintiffs' lead counsel from New York was being "compensated near the high end of the Atlanta market." *Kenny A.*, 454 F. Supp. 2d at 1286. On appeal, the Court of Appeals panel noted this fact: "The court did not reduce the requested rates at all even though some of them were New York rates instead of Atlanta rates, and even though some of the attorneys (for example, Marcia Robinson Lowry, one of the two lead attorneys) recently had been awarded a smaller hourly rate for work on another case of exactly the same type." *Kenny A.*, 532 F.3d at 1217.

B. The District Court's Award of an Enhancement for Quality of Representation Was an Abuse of Discretion, Particularly When the Lodestar Was Substantially Reduced for Excessive Hours Billed.

Once again, the decision of the District Court in this case as affirmed by the Eleventh Circuit shows the peril of permitting the lodestar to be enhanced based on quality of representation. The District Court adopted an extremely broad interpretation of the reference in *Blum* that upward adjustments of the lodestar "are still permissible 'in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged . . . ,'" notwithstanding the *Delaware Valley I* admonishment that quality of representation "cannot serve" as a basis for making such an upward adjustment. *Kenny A.*, 454 F. Supp. 2d at 1288 (quoting *Blum*, 465 U.S. at 899, and *Delaware Valley I*, 478 U.S. at 565).

The "specific evidence" relied upon by the District Court is evidence that this Court has already ruled inappropriate for such consideration and merely duplicates what is already subsumed in the lodestar. The facts that underlay the District Court's finding that quality of representation "was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect" were the facts that class counsel were required to advance

expenses, were not paid on an ongoing basis, and had a fee and expense reimbursement contingent on the outcome of the case.[23] *Id.* In other words, because payment would be delayed and was contingent on success, the taxpayers of Georgia were assessed a $4.5 million penalty. That is directly contrary to both (1) this Court's holding that delay in compensation is remedied by fee recovery based on current rates when the fee petition is filed, *see Jenkins*, 491 U.S. at 283-84; *Delaware Valley II*, 483 U.S. at 716, and (2) the Court's opinion in *Dague*, which held that enhancement for contingency – or the risk that an attorney *may not be paid at all* for costs advanced and fees earned – is not permitted under a fee-shifting statute, *Dague*, 505 U.S. at 567. Indeed, as stated by one of the Circuit Court judges, it is simply "the nature of the beast" that attorneys for plaintiffs in civil rights actions have to advance the cost of the litigation.

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[23] The District Court cited as support for this conclusion declarations filed in support of the fee application by four Atlanta lawyers who represent plaintiffs. *See Kenny A.*, 454 F. Supp. 2d at 1288. These self-interested declarations, however, provide no basis to support the $4.5 million enhancement. *See U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 724-25 (1990) (discounting record based on affidavits "small in volume, anecdotal in character, and self-interested in motivation" and "blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted"); *see also Kenny A.*, 532 F.3d at 1231 (Carnes, J., concurring) (stating that the District Court's conclusion that the declarations were from "disinterested Atlanta attorneys" was clearly erroneous and "the lawyers who signed the [declarations] have a financial interest in keeping the fee award in this case and every case like it as high as possible").

Kenny A., 532 F.3d at 1227 (Carnes, J., concurring). If delayed payment and risk of loss were grounds for a quality of representation enhancement, then such an enhancement "would be required in virtually every class action covered by one of the traditional federal fee-shifting statutes." *Id.* This "specific evidence" cited by the District Court therefore cannot possibly justify an enhanced fee award.[24]

The other "specific evidence" cited by the District Court to justify a quality of representation enhancement is based upon the court's "personal observation" of Plaintiffs' counsel's performance in the litigation, which the court found "far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Kenny A.*, 454 F. Supp. 2d at 1288-89. If that was not praise enough, the District Court stated that Plaintiffs' counsel brought more skill and professionalism to this litigation "than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289.

First, what the District Court referred to as "standard hourly rates" ranged from $215 to $495 an hour, which the District Court itself found were

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[24] The District Court appears to have known it was skating on thin ice because it acknowledged the prohibition against contingency enhancement in *Dague*, but reasoned that this Court did not mean to prohibit what can be referred to as "contingency plus." *Kenny A.*, 454 F. Supp. 2d at 1288 n.8. Petitioners submit that when the "plus" means contingency plus delayed payment, it means nothing more than "contingency."

"eminently fair and reasonable," "consistent with the prevailing market rates in Atlanta for comparable work," and with respect to the highest rate, "near the high end of the Atlanta market." *Id.* at 1285-86, 1289. Indeed, a 1.75 multiplier made the actual hourly rate recovered for Plaintiffs' two lead counsel $866.25 and $787.50 ($495 and $450, respectively, multiplied by 1.75), far above the Atlanta market rates. In addition, the fact that Plaintiffs' counsel performed with the highest degree of skill and professionalism entitles them to be compensated by the same reasonable hourly rate in the prevailing market as any other lawyer who is required to represent his or her client with the same degree of skill and professionalism. Permitting an enhancement to an otherwise reasonable fee on such a basis would create two classes of attorneys in this country: one class that performs adequately and is entitled to one fee, and the other class that performs above the accepted norm and gets a bonus for a job well done. The problem with this distinction is that both classes have the exact same ethical duty to work zealously on behalf of their clients and should receive the same payment for the same work. *See, e.g.*, Model Rules of Prof'l Conduct 1.1, 1.3 & 1.3 cmt. 1 (2008) (stating *inter alia* that a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and should also "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

Second, the District Court ignored the inconsistency of, on the one hand, reducing the lodestar amount by over $1 million (or 15% of the fee requested) because of unreasonable and excessive billing while, on the other hand, applying a 1.75 multiplier for superb lawyering. This Court has explicitly held that a district court's "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Delaware Valley I*, 478 U.S. at 566-67.

Third, one must keep in mind that the entire purpose of the Act is to enable plaintiffs to attract competent counsel while avoiding windfalls. There is no dispute that the hourly rates found as "eminently fair and reasonable" and, in one case, "near the high end" of the market would enable these or any plaintiffs to obtain competent counsel. The class in this case was able to obtain excellent counsel without any promise of reward to that counsel for extraordinary performance. *See Delaware Valley I*, 478 U.S. at 568. It is unlikely that any lawyer, including Plaintiffs' counsel, would argue that he or she would have worked less (some 30,000 hours in just over three years), failed to raise any particular claim, or negotiated a less comprehensive settlement had he or she not had a chance to recover an enhanced fee award.

Permitting an enhancement to the lodestar for quality of representation would be an unfortunate acknowledgement that those in our profession need

an additional monetary incentive in order to perform in an excellent manner. That is not the standard of our profession. Class counsel in this case performed extremely well, as their clients would have expected, and have been awarded a lodestar of more than $6 million based on reasonable hourly rates. The Act does not require more, and this case starkly demonstrates that something is very wrong with the current system if multi-million-dollar fee enhancements from the public purse are available to overcompensate attorneys who are duty-bound to represent their clients with the utmost zeal and competency, irrespective of their potential fee recovery.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Eleventh Circuit affirming the award of a $4.5 million enhancement to the lodestar should be reversed.

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Petitioners

v.

KENNY A., By His Next Friend Linda Winn, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Can an attorney's fee award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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STATEMENT OF THE CASE

In 2002, Georgia's state-run foster care system as operated in metropolitan Atlanta (Fulton and DeKalb Counties) was in disarray. Children at two emergency shelters suffered under truly deplorable conditions. And more broadly, a system intended to protect children temporarily in state foster care custody pending reunification with their families or adoption was accomplishing neither goal while subjecting children to abusive and dangerous conditions. Meanwhile, children routinely languished in state custody for years, in some cases their entire childhood.

Plaintiffs filed this action for declarative and injunctive relief to stop the physical, emotional, and psychological harm that was being inflicted upon thousands of abused and neglected children in state custody. After the district court entered a consent decree awarding comprehensive relief to the class, it determined that plaintiffs were entitled to a reasonable attorney's fee. The fee included approximately $6 million based on each attorney's hours worked and hourly rate, as well as a 75% enhancement based on the exceptional quality of the attorneys' work and the exceptional results obtained. After the court of appeals upheld the award, this Court granted review limited to a single question: whether an enhancement may *ever* be based on quality of work or results obtained. The text, legislative history, and this Court's precedents make clear that the question must be answered in the affirmative.

1. Plaintiffs, nine foster children and a putative class of all 3,000 foster children in Fulton and DeKalb Counties, filed a class action complaint on June 6, 2002, in the Superior Court of Fulton County, Georgia. Pet. App. 96. Plaintiffs asserted 15 causes of action against state officials, including claims under federal law pursuant to 42 U.S.C. § 1983, alleging a systemic failure to oversee the safety of foster children and to provide them with basic services such as medical, dental, and mental health care. Pet. App. 96.

The district court later found that this case was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench," requiring "enormous time and effort." *Id.* at 94-95, 96. That time and effort began long before the suit was filed. Litigation of this type generally requires extensive pre-suit investigation. J.A. 35-36; Pet. App. 117. Unlike litigation focused on one or two institutions, pre-suit investigation of a foster-care system is a time-consuming undertaking because foster children reside in a variety of settings, including foster homes that house a small number of children; relatives' homes; group homes, institutions, and shelters that may be run by the State or a private entity on behalf of the State; supervised independent living arrangements; and trial visits at home. *See* J.A. 36.

Although the suit was initially filed in state court, the State removed the case to federal court. Plaintiffs then sought expedited discovery and moved for a preliminary injunction against the State's continued operation of two emergency

shelters in which children endured truly dangerous conditions. Pet. App. 98-99. Following a four-day evidentiary hearing and testimony by many fact and expert witnesses, the district court found that plaintiffs had "established numerous major deficiencies in the foster care system in general and in the emergency shelters in particular." *Id.* at 99, 120. Among other things, the emergency shelters subjected children to violence, sexual assault, gang activity, illicit drug use, overcrowding and unsanitary conditions, and almost complete lack of adult supervision. At the hearing, defendants agreed to close the two dangerous shelters. *Id.* at 99, 119-20. The consent decree ultimately entered in this case includes "significant protection against the risk of future peril from the improper use of emergency shelters." *Id.* at 99, 120; *see also* J.A. 124.

Although the preliminary injunction hearing focused on deficiencies in the emergency shelters, the remainder of the litigation addressed system-wide problems. Defendants raised a number of threshold issues. First, they argued that the federal court to which they had removed the case should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). Next, they argued that the court should dismiss the complaint for failure to state a claim in light of an Eleventh Circuit precedent dismissing a child-welfare class action, *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003). Plaintiffs successfully defeated those motions. *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 284-289 (N.D. Ga. 2003). Plaintiffs also defeated defendants' challenge based on the commonality and typicality

requirements for class certification under Fed. R. Civ. P. 23. *Kenny A.*, 218 F.R.D. at 299-302; *see also* Pet. App. 99-100.

Discovery concerning Georgia's child welfare system was a labor-intensive and time-consuming endeavor. The district court recounted the obstacles plaintiffs faced during discovery, finding that defendants' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." Pet. App. 96; *see also id.* at 171. In one instance, the district court "was forced to admonish State Defendants for 'relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.'" *Id.* at 100 (citation omitted). In all, class counsel reviewed and analyzed nearly half a million pages of documents, and the parties took and defended more than 60 depositions. *Id.* at 121; *see also* J.A. 53.

The State rejected a cost-saving proposal to conduct a joint record review. Pet. App. 121-22. Such reviews collect information from a random sample of children's case records to demonstrate that the harms experienced by the named plaintiffs are pervasive throughout the foster care system. After the parties had exchanged extensive expert reports and completed expert discovery, defendants filed a voluminous motion for summary judgment. As the district court noted, the motion "was supported by a 74-page memorandum and a 126-page Statement of Undisputed Material Facts consisting of 612 separately number[ed] paragraphs, as well as a 48-page Statement of

Legislative Facts consisting of 74 separately numbered paragraphs," along with six affidavits and three volumes of appendices. *Id.* at 101. Defendants followed that motion with a motion to exclude the reports and testimony of all of plaintiffs' experts. *Id.* In mid-2004, in light of the passage of time, the district court authorized updated fact and expert discovery. *Id.* at 102.

In October 2004, with a February 2005 trial date approaching, the district court appointed a mediator and directed the parties to explore settlement. *Id.* In December 2004, the district court denied defendants' motions for summary judgment and to exclude the reports and testimony of plaintiffs' experts. *Id.* at 103; *see also Kenny A. ex rel. Winn v. Perdue*, No. 1:02-cv-1686, 2004 WL 5503780 (N.D. Ga. Dec. 13, 2004). Defendants moved to amend that order and for certification of an immediate interlocutory appeal. Pet. App. 103. "While that motion was pending, efforts at mediation began in earnest," with the parties engaging in 18 mediation sessions over four months. *Id.*

2. In July 2005, the parties presented the court with a proposed consent decree. *Id.* at 103-04. After directing notice to the class, conducting the requisite fairness hearing, and considering comments received from interested parties, the district court granted final approval to the class-wide settlement and entered the consent decree as an order of the court. *Id.* at 104.

The consent decree was designed to eliminate the worst abuses of Georgia's foster care system,

while attempting to facilitate the goal of minimizing a child's time in the foster care system by maximizing the prospect for timely reunification or adoption. J.A. 99-101. The district court explained that "[t]he Consent Decree provides sweeping relief to the plaintiff class, the scope of which can only be fully appreciated by summarizing its provisions." Pet. App. 152. The decree's "centerpiece is a series of thirty-one outcome measures that State Defendants have agreed to meet and sustain for at least three consecutive six-month reporting periods." *Id.* "The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect, regular visits of foster children by case workers; approval and licensure of foster homes and other placements, the percentage of children who are victims of substantiated maltreatment while in foster care, the percentage of children in foster homes that exceed their licensed capacity, the percentage of children who have experienced multiple moves while in foster care; and periodic judicial reviews of the safety and status of foster children." *Id.* at 152-53.

The decree also "requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and

institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children." *Id.* at 153. In addition, the "State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a 'needs assessment' to be conducted by a neutral expert." *Id.*

Finally, the decree "includes processes for the supervision of private contract agencies that provide homes and services for foster children, improvements in foster parent screening, licensing and training, as well as foster parent support and communication, improvements in case manager training, improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in foster care, and improvements in efforts to maximize available federal funding." *Id.*

3. The parties agreed that plaintiffs were entitled to a reasonable attorney's fee under 42 U.S.C. § 1988, but could not agree on the amount. Pet. App. 104; *see also* J.A. 184-85. Plaintiffs then filed a motion with supporting evidence for an award of reasonable attorney's fees. Pet. App. 104-05; *see also* J.A. 27-91.

The district court employed a two-step analysis by first determining the number of hours reasonably expended by plaintiffs' counsel multiplied by reasonable hourly rates and then

"consider[ing] whether any adjustment to the lodestar is appropriate in this case." Pet. App. 111 (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

In calculating the total hours reasonably expended, the district court reviewed 15 categories of work performed by plaintiffs. *Id.* at 116-40. Having determined that some reductions were appropriate for duplicative, excessive, or unclear billing entries, the court made an across-the-board 15-percent reduction in plaintiffs' billable hours for all non-travel-related fees. *Id.* at 145. In calculating reasonable hourly rates, the district court found that defendants had offered "no evidence to rebut the *prima facie* proof of prevailing market rates submitted in connection with plaintiffs' fee application." *Id.* at 142. Plaintiffs' evidence included the sworn declarations of co-lead counsel for plaintiffs, *see* J.A. 27-59, as well as "the sworn affidavits of several highly experienced and well-respected members of the Atlanta bar, each of whom states that the rates requested are 'reasonable and solidly within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience.'" Pet. App. 142 (citations omitted); *see also* J.A. 60-91. The court concluded that the rates presented by plaintiffs were "fair and reasonable," and "[i]f anything, they are too low." Pet. App. 144.

Multiplying the allowed hours by those rates, the district court calculated an initial lodestar of $6,012,802.90. *Id.* at 144-45. The court noted that this amount was "commensurate with" the $6.1

million value of defendants' own legal expenses "if they had been required to pay for their legal services in this case at standard hourly rates in the private marketplace." *Id.* at 148, 149 & nn.6 & 7.

The district court then addressed plaintiffs' request for an upward adjustment, the first such request that counsel for Children's Rights had ever made, despite their involvement in numerous similar suits. *Id.* at 150-55. In finding that an upward adjustment was necessary to yield a reasonable fee, the court reviewed the specific evidence submitted by plaintiffs, including approximately 2,500 pages of time and expense records, the declarations of co-lead counsel, and those of four Atlanta attorneys, each of whom was "well known to the court and well respected in the Atlanta legal community," and possessed "extensive experience in complex class action litigation." *Id.* at 155; *see also* J.A. 60-91.

Each of those four attorneys opined that the fees and expenses plaintiffs sought were reasonable and that an award limited to the lodestar would be unreasonable and would *undercompensate* plaintiffs' counsel. Pet. App. 155. Three of the attorneys testified that an upward adjustment of one-and-a-half to two times the lodestar was necessary to yield a reasonable fee consistent with the prevailing prices in the Atlanta market for services of comparable value. *Id.* A fourth recommended a multiplier of up to five. *Id.* Defendants did not submit any rebuttal evidence on this issue.

Based upon its review of the evidence, its first-hand observation of the proceedings, and its own experience, the district court concluded that an upward adjustment was necessary to provide a reasonable fee. *Id.* The court found, based on the evidence, "that the superb quality of [plaintiffs'] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar," *id.* at 151, rates the court had previously found to be, "[i]f anything . . . too low." *Id.* at 144. The court also found that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 151-52.

The district court further found that "the evidence established that plaintiffs' success in this case was truly exceptional." *Id.* at 152. After reviewing the consent decree's numerous specific provisions, the court concluded that "the settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage." *Id.* at 154. "After 58 years as a practicing attorney and federal judge, the court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.*

In addition to those factors, the district court noted class counsel's "extraordinary commitment of capital resources." *Id.* at 151. In particular, counsel "were required to advance case expenses of $1.7 million over a three-year period," "were not paid on an ongoing basis," and were not assured of

compensation. *Id.* All told, plaintiffs' counsel expended over 30,000 hours on this contentious case over four years, and shouldered over $1.65 million in taxable and non-taxable expenses. *Id.* at 169.

The court concluded that a 1.75 upward adjustment to the initial lodestar was the "minimum . . . necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 155. Multiplying the lodestar by that amount, the fee award totaled $10,522,405.08. *Id.* at 154-55.

4. The Eleventh Circuit unanimously affirmed. *Id.* at 1-93. The court of appeals found no abuse of discretion in the district court's determination of the number of hours or the hourly rates used to calculate the lodestar, and no abuse of discretion in the district court's decision to apply an upward adjustment. *Id.*

With respect to the enhancement, Judge Carnes wrote separately to make clear that his vote to affirm was based solely on binding circuit precedents with which he disagreed. *See id.* at 17-70 (Carnes, J., concurring) (Part VI). Judge Wilson wrote separately and opined that the enhancement was appropriate not only under binding circuit precedent, but also under this Court's decisions. *Id.* at 71-93 (Wilson, J., concurring). Judge Hill concurred in the judgment, without "add[ing] anything to my colleagues' discussions." *Id.* at 93 (Hill, J., concurring).

5. The court of appeals denied rehearing *en banc*. *Id.* at 174. In a concurring opinion, Judge Wilson explained that "[s]everal decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute, in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Id.* In Judge Wilson's view, "*Kenny A.* is that case." *Id.* at 180. Judge Tjoflat authored a dissenting opinion, *id.* at 180-202, as did Judge Carnes, *id.* at 202-223.

SUMMARY OF ARGUMENT

A. Petitioners' proposed categorical, no-enhancements rule cannot be reconciled with Congress' decision to authorize "reasonable" fees or with any indicia of congressional intent. Although that word choice does not eliminate all ambiguity, it provides *no* support for petitioners' proposed bright-line rule. Moreover, petitioners' proposal cannot be reconciled with either Section 1988's legislative history or the legal backdrop against which Congress legislated. The House and Senate committee reports both make clear that Congress knew enhancements had traditionally been awarded based on superior performance and results and intended to continue that practice. Both reports explain that fees had traditionally been awarded under a multi-factor approach that looked in part to quality of work and results obtained, *not* pursuant to a rigid lodestar calculation. Moreover, the Senate Report identifies three exemplary cases in which a reasonable fee was "correctly"

calculated, and two of the three cases awarded enhancements above the lodestar figure based on exceptional work and results. S. Rep. No. 94-1011, at 6 (1976). This Court has repeatedly relied on, and considered authoritative, this very legislative history.

The committee reports go on to explain that Congress wanted to ensure parity between fee awards in civil rights cases and those in other types of complex federal litigation, such as antitrust cases. Because enhancements were and remain common in those other contexts, petitioners' no-enhancements position cannot be squared with Congress' intent.

Petitioners insist that the committee reports' disapproval of "windfalls" supports their position. But the Senate Report specifically pointed to the exemplary cases, two of which involved enhancements, as awards that did "*not* produce windfalls to attorneys." *Id.* (emphasis added). Petitioners' effort to equate enhancements with windfalls is fundamentally mistaken. Moreover, other limits on the recovery of fees, including this Court's holdings that risk of nonpayment and expert fees are not compensable, eliminate any concern that civil rights counsel will receive windfalls.

B. This Court has already rejected the no-enhancements position now espoused by petitioners, and petitioners do not even attempt to justify overruling this Court's precedents. Beginning in 1983, this Court has always treated the lodestar as a "useful starting point" while

expressly acknowledging the availability of enhancements based on factors such as the "results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 434 (1983). In *Blum v. Stenson*, 465 U.S. 886, 901 (1984), this Court was squarely presented with the same question presented here, and it explicitly answered the question by holding that enhancements *are* permissible in rare cases based on superior quality and exceptional results. While some Members of Congress sought to overrule *Blum* by proposing legislation that would have barred all enhancements, that legislative effort failed.

This Court's decisions since *Blum* acknowledge the availability of enhancements and do not purport to overrule *Blum*. That some of those cases rejected *other* bases for enhancements only underscores the need to retain enhancements based on exceptional quality of work and results. This Court has long recognized that Congress intended to permit enhancements at least in some cases. Petitioners' no-enhancements rule would completely unmoor this Court's jurisprudence from that intent.

C. Petitioners are mistaken in arguing that the lodestar necessarily takes into account superior performance and results. Reasonable rates are forward-looking, whereas enhancements look back on actual performance and results. Nor does the lodestar always reflect the value of a lawyer's services because brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience. Thus, in the competitive marketplace, highly sophisticated

clients that are not interested in bestowing windfalls nonetheless sometimes agree to pay enhanced amounts above hourly rates and billable hours. In any event, a conclusion that enhancements are incompatible with petitioners' lodestar model would be an indictment of that model, not of enhancements, because Congress clearly intended to permit enhancements and nowhere expressed an intent to adopt a lodestar-only (or lodestar-and-only-reductions) approach.

D. Petitioners' no-enhancements position not only elevates their view of good policy over Congress' intent, it also makes for bad policy. Petitioners would turn adjustments into a one-way ratchet, with the lodestar acting not as a presumptive starting point but as a ceiling. The best attorneys could hope to recover would be their normal rate for cases in which payment does not depend on success. And attorneys would have every expectation of receiving less because of the numerous grounds for reducing an award or denying recovery altogether. That could not help but undercompensate civil rights counsel.

ARGUMENT

SECTION 1988 DOES NOT CATEGORICALLY BAR ENHANCEMENTS FOR EXCEPTIONAL PERFORMANCE AND RESULTS

The district court faithfully followed this Court's decision in *Blum* by holding that, while "most of the factors relevant to calculating a reasonable fee award are already reflected in the lodestar amount," "upward adjustments of the lodestar figure are still permissible 'in the rare case where

the fee applicant offers specific evidence to show that quality of service was superior to that one should reasonably expect in light of the hourly rates charged and that the success was "exceptional."'" Pet. App. 150 (quoting *Blum*, 465 U.S. at 899). Applying that correct legal standard to the facts here, the court awarded an enhancement based on its thorough analysis of the record and familiarity with the conduct of this litigation. *Id.* at 154-55.

The district court explained that respondents' "counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 151-52. And "[a]fter 58 years as a practicing attorney and federal judge," the court was "unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 154.

By expressly and unabashedly advocating a categorical no-enhancements rule, petitioners implicitly recognize that if any case justifies an enhancement based on superior work and exceptional results, this is it. *E.g.*, Pet. Br. 13. Likewise, this Court, by limiting its grant of certiorari "to Question 1 presented by the petition," 129 S. Ct. 1907, has made clear that the sole question remaining in this case is whether Section 1988 *ever* permits enhancements based on quality of work and results obtained. *See* Pet. (i); Pet. Br. (i). Yet this Court has already squarely rejected the categorical argument that Section 1988 forbids upward enhancements for superior work and

results in *Blum*, and it has repeatedly held out the availability of such enhancements in the rare case. The reason for the Court's treatment of such enhancements is straightforward: petitioners' proposed categorical rule is irreconcilable with the text, legislative history, and legal backdrop of Section 1988. Petitioners' resort to policy arguments to defend their proposed categorical rule cannot justify disregarding this Court's precedents or the manifest intent of Congress, and it is misguided in any event.

I. THE TEXT, LEGISLATIVE HISTORY, AND LEGAL BACKDROP OF SECTION 1988 CONFIRM THAT CONGRESS DID NOT INTEND TO FORECLOSE ALL ENHANCEMENTS

Section 1988 permits a court to award a "prevailing party, other than the United States, a *reasonable attorney's fee* as part of the costs" of prosecuting a successful claim under certain civil rights statutes. 42 U.S.C. § 1988(b) (emphasis added). The statute's text does not, however, define the term "reasonable" or offer specific textual directions as to how to calculate a reasonable attorney's fee. *See Blanchard v. Bergeron*, 489 U.S. 87, 91-93 (1989); U.S. Br. 11. Nevertheless, the one thing the word "reasonable" does not suggest is a categorical, bright-line rule. As this Court has observed in other contexts, such as the Fourth Amendment's prohibition against unreasonable searches and seizures, reasonableness inherently turns on all of the facts and circumstances, as opposed to bright-line rules. *United States v. Banks*, 540 U.S. 31, 35-36 (2003) (citing cases).

An *authorization* for "reasonable" fees would seem to be an exceedingly unlikely textual basis for a categorical *bar* on enhancements. That reality is amply demonstrated by the text Congress employed when it adopted petitioners' favored approach. In the attorney's fee provision of the Individuals with Disabilities Education Act (IDEA), Congress adopted petitioners' position, not based on a general authorization for reasonable fees, but through the precise textual device one would expect for such a bar: an express prohibition on the use of a bonus or multiplier. Specifically, the statute states that "[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection." 20 U.S.C. § 1415(i)(3)(C). The conference committee report for that legislation makes clear that Congress understood that enhancements were permitted under Section 1988, but intended to adopt a different, more restrictive approach in the IDEA: "The conferees want to make it clear that the inclusion of the prohibition against calculation of fees using bonuses and multipliers is limited to cases brought *only* under part B of the Education of the Handicapped Act. The conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to *other* statutes such as 42 U.S.C. 1988." H.R. Conf. Rep. No. 99-687, at 2 (citing, *e.g.*, *Hensley*, 461 U.S. 424; *Blum*, 465 U.S. 886) (emphasis added). Congress understood that authorizing a reasonable attorney's fee would permit rather than preclude enhancements, and it chose to add an additional provision prohibiting them in the IDEA but *not* in Section 1988.

Petitioners complain that Section 1988 does not use the words "enhancement" or "bonus," Pet. Br. 19, but when Congress sought to forbid enhancements, it used those terms in a prohibition; it did not rely on a general authorization of reasonable fees. Moreover, Section 1988 clearly does not refer to "lodestars," billing rates, or hours worked. Petitioners bear the burden here of identifying a categorical bar to enhancements, and the word "reasonable" provides no support for such a per se rule. The most that could be said about the statute's lack of specificity as to how to calculate a reasonable attorney's fee is that there is some ambiguity on this point.

That is not, of course, a license for freewheeling judicial policymaking, divorced from the legislature's intent. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). Instead, the Court must resolve any ambiguity in light of other indications of congressional intent, including legislative history and the context in which Congress legislated. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 163 (1997). As this Court has explained, "it is apparent that the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress," not the courts, "to determine." *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975) (emphasis added).

Here, both the legislative history and the legal backdrop against which Congress legislated point in the same direction. As this Court has observed, "Congress was legislating in light of experience when it enacted" Section 1988. *Blum*, 465 U.S. at

894 n.10. The committee reports make clear that Congress knew that enhancements had traditionally been granted based on exceptional work and results, and that Congress intended to continue that practice under Section 1988.

A. The Legislative History Makes Clear That Enhancements Are Permissible Under Section 1988

1. While Members of this Court have disagreed on the relevance of legislative history, the Court has always held that such history is relevant to the interpretation of ambiguous statutes. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989); *Blum*, 465 U.S. at 896. And if ever a statutory term called out for resort to legislative history, it is a term like "reasonable." Not surprisingly, then, in construing Section 1988, including its unadorned reference to "a reasonable attorney's fee," the Court has repeatedly relied on—and placed significant weight on—Section 1988's legislative history, especially the House and Senate committee reports. *See Blanchard*, 489 U.S. at 91-93 & n.6; *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986) ("*Delaware Valley I*"); *Blum*, 465 U.S. at 893-96; *Hensley*, 461 U.S. at 429-31.

Committee reports are the most authoritative source of legislative history. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). And here, they directly address and answer the question presented. *See Seals v. Quarterly County Court*, 562 F.2d 390, 394 (6th Cir. 1977). Thus, if the question presented is to be answered by reference

to what the Congress that enacted Section 1988 intended, the reports supply the answer: upward enhancements are permitted.

2. As this Court has noted, the committee reports confirm that Congress enacted Section 1988 to respond to this Court's decision in *Alyeska,* which required specific congressional authorization to justify an award of attorney's fees. H.R. Rep. No. 94-1558, at 2-3 (1976); S. Rep. No. 94-1011, at 1; *see also Hensley*, 461 U.S. at 429. Until *Alyeska*, federal courts had awarded reasonable fees to prevailing parties in civil rights and other cases pursuant to a common law approach, and had generated a substantial body of law concerning the appropriate standards for setting reasonable fees. *See, e.g., Lee v. So. Home Sites Corp.*, 444 F.2d 143, 143 (5th Cir. 1971); *see also* pp. 25-29, *infra.* The committee reports make clear that Congress sought to reinstate the pre-*Alyeska* regime by "direct[ing] that attorney's fees be calculated according to *standards currently in use* under other fee-shifting statutes." *Blum*, 465 U.S. at 893 (emphasis added).

Both the Senate and House Reports identify the "appropriate standards" as those listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). S. Rep. No. 94-1011, at 6; H.R. Rep. No. 94-1558, at 8. *Johnson* lists 12 factors to be considered, including "the results obtained" and the "ability of the attorneys"—*i.e.*, the very factors the district court relied on to support the enhancement

here. *Hensley*, 461 U.S. at 430 n.3 (citing *Johnson*, 488 F.2d at 717-19).[1]

The Senate Report went even further in clarifying the proper method for calculating a reasonable attorney's fee by giving three examples of cases that "correctly applied" the *Johnson* factors. S. Rep. No. 94-1011, at 6 (citing *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)). These exemplars of the proper calculation of a reasonable attorney's fee confirm that enhancements for exceptional work and results are permitted under Section 1988. Indeed, in two of the three cases, the properly calculated fee included such an enhancement. *Stanford Daily*, 64 F.R.D. at 687-88; *Davis*, 8 E.P.D. ¶ 9444, at 5048. And in the third, the court considered the "results obtained" and "exceptional" ability of the plaintiffs' counsel, among other factors, in setting the fee. *Swann*, 66 F.R.D. at 484, 486.

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[1] The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

In *Stanford Daily*, the court awarded a reasonable attorney's fee to plaintiffs who prevailed on a Fourth Amendment claim. 64 F.R.D. at 681. The court found that counsel devoted 750 hours to the case and should receive a $50 average billing rate. *Id.* at 687-88. But rather than award a fee simply by multiplying the hours worked by a reasonable hourly rate, the court instead increased the base figure of "hours worked times average billing rate" by more than 25 percent in light of "the attorneys' work, and the results which they obtained through their work." *Id.* at 687-88.

Similarly, in *Davis*, the court awarded a reasonable attorney's fee to plaintiffs who prevailed on a Title VII claim. 8 E.P.D. ¶ 9444, at 5047. The court reduced the number of hours to be compensated and the overall award by more than $1,000 for some duplicated effort and timekeeping deficiencies. *Id.* at 5048. Nevertheless, due in part to the achievement of "excellent results" and the "conduct of plaintiffs' attorneys throughout the case," the court increased the award "above the normal hourly rates" by approximately $7,000, for a total award of $60,000. *Id.*

Thus, petitioners' contention that "there is no indication from . . . the legislative history that any type of enhancement can be added to a fee award based on results obtained or quality of representation," Pet. Br. 19, is simply mystifying. By stressing that the exemplary cases "correctly applied" the *Johnson* factors, S. Rep. No. 94-1011, at 6, the Senate Report confirms that Congress intended to permit enhancements based on superior work and results. That intent controls,

and squarely refutes petitioners' position that Section 1988 prohibits "any type of enhancement to the attorney's fee award." Pet. Br. 13.

Indeed, this Court has previously relied on the committee reports for this very point. The Court rooted its two-step approach—a lodestar calculation followed by upward or downward adjustments—in "the cases cited in the legislative history." *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 434-35). Quoting widely from the Senate Report, *Hensley* highlighted congressional approval of the *Johnson* factors and noted that the Senate Report "cited approvingly" to three district court cases that "correctly applied" *Johnson*. 461 U.S. at 429-30 & n.4. Likewise, in *Blum*, which expressly rejected the categorical approach petitioners urge, *see* pp. 42-45, *infra*, the Court again quoted the Senate Report for the proposition that *Johnson*, *Stanford Daily*, *Davis*, and *Swann* "resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." 465 U.S. at 893-94 (quoting S. Rep. No. 94-1011, at 6); *see also id.* at 897 ("[T]he Senate Report identified four cases that had calculated correctly a reasonable attorney's fee."). In *Blanchard*, moreover, the Court reaffirmed that "*Johnson* provides guidance to Congress' intent" and that *Stanford Daily*, *Davis*, and *Swann* each correctly applied the *Johnson* factors. *Blanchard*, 489 U.S. at 91-92; *cf. id.* at 99 (Scalia, J., concurring in part and concurring in the judgment) (criticizing majority for "treating

Johnson and the District Court trilogy as fully authoritative").[2]

The cases cited in the Senate Report and relied on in this Court's decisions were not outliers. At the time of Section 1988's enactment, other courts of appeals had adopted a similar approach of starting with a lodestar and then "inject[ing] flexibility into the fee-setting process by requiring that the value of the services be finally determined by consideration of . . . additional factors," including "the quality of the work performed" and "the recovery obtained." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 168 (3d Cir. 1975); *see also Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976) (en banc) ("*Lindy II*"); *accord Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir. 1975); *City of Detroit v. Grinnell*, 495 F.2d 448, 470-71, 473 (2d Cir. 1974); *see also Parker v. Matthews*, 411 F. Supp. 1059, 1067-68 (D.D.C. 1976) (citing *Johnson* and awarding "an incentive fee of twenty-five per cent" in a Title VII case).

In light of the legislative history and legal backdrop, it is simply not tenable to attribute to Congress an intent to prohibit all enhancements through the peculiar mechanism of *authorizing*

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[2] While *City of Burlington v. Dague*, 505 U.S. 557 (1992), rejected a ground for enhancement—risk of loss—that was mentioned in some of the cases in the Senate Report, it did not repudiate or even address the Court's prior reliance on the Senate Report and the cases cited therein. Instead, as discussed below, *Dague* is best understood as construing the statute's requirement that fees be awarded only to prevailing parties. *See* pp. 49-51, *infra*.

reasonable attorney's fees. The lodestar methodology—a rote calculation of hours worked multiplied by a reasonable hourly rate—was not unknown to the Congress. Yet the legislative history and backdrop make clear that Congress contemplated a multi-factor inquiry, not a simple mathematical calculation with no possibility for upward adjustments. Thus, while the lodestar provides a useful starting point for analysis, petitioners' attempt to make it the alpha as well as the omega would sever this Court's jurisprudence from the text and every indicia of congressional intent. Such a lodestar-only (or lodestar-and-downward-adjustments-only) approach to attorney's fees might (or might not) be a defensible policy choice, *but cf.* pp. 58-62, *infra*; it is manifestly *not* the approach adopted by Congress in Section 1988.

B. Congress' Intent To Adopt The Same Standards Used In Commercial Litigation Further Supports Enhancements

The committee reports not only clearly embrace enhancements as an integral aspect of the *Johnson* approach, they also express Congress' intent "that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011, at 6 (quoted in *Blanchard*, 489 U.S. at 95). Simply put, "civil rights plaintiffs should not be singled out for different and less favorable treatment" relative to

antitrust and other commercial plaintiffs. H.R. Rep. No. 94-1558, at 8-9.

Significantly, the prevailing practices in antitrust and securities cases at the time of Section 1988's enactment and ever since allow for exactly the type of enhancement that the district court awarded here. By seeking to limit awards in civil rights litigation to the lodestar, petitioners would categorically cap such awards below those awarded in other complex litigation, and thereby eviscerate yet another of Congress' stated goals.

1. At the time of Section 1988's enactment, fee enhancements in commercial cases were accepted and widespread—and sometimes much higher than the multiplier here. For example, in *Arenson v. Board of Trade*, an antitrust suit, the district court awarded "four times the petitioning attorneys['] normal hourly rate" based in part on "the significant result achieved." 372 F. Supp. 1349, 1358 (N.D. Ill. 1974). According to the court, the "award of four times the hourly rate of the plaintiffs' attorneys is meant to adequately compensate them for initiating this significant litigation and negotiating such a beneficial settlement for the class; yet at the same time this award is not meant to provide a wind fall to the plaintiffs' attorneys." *Id.* at 1359; *see also In re Gypsum Cases*, 386 F. Supp. 959, 967, 969, 978-79 (N.D. Cal. 1974) (calculating a reasonable fee in an antitrust case by applying "weighted factor" between 1.75 and 3 to the hourly rates of many of the attorneys who were entitled to fees).

Similarly, in *Wynn Oil Co. v. Purolator Chem. Corp.*, 391 F. Supp. 522, 523-24 (M.D. Fla. 1974), which involved an award of fees under an antitrust fee-shifting statute, 15 U.S.C. § 15, the court approvingly cited *Johnson*. Based on "the nature of the issues, the character and extent of opposition encountered, the exceptional experience and trial skill of counsel on both sides, the effective presentation of plaintiff's case, the amounts involved and those recovered for plaintiff," the court awarded an enhancement of approximately 50 percent. 391 F. Supp. at 528. There are many similar cases in the antitrust, securities, and other commercial contexts.[3]

2. To be sure, many (though not all) of the non-civil rights cases involved fees paid out of common funds, such as damages awards, rather than by defendants pursuant to fee-shifting statutes. As

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[3] *See, e.g., Pete v. United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1289-90 (D.C. Cir. 1975) (affirming incentive premium of "ten percent"); *Barr v. WUI/TAS, Inc.*, 1976-1 Trade Cases ¶ 60,725, 68,119 (S.D.N.Y. 1976) (awarding 20 percent "premium" in antitrust case); *Federman v. Empire Fire & Marine Ins. Co.*, Fed. Sec. L. Rep. ¶ 95,418, 99,116 (S.D.N.Y. 1976) (awarding "a premium of 25% over [the attorneys'] normal fee" in securities case); *Rota v. Bhd. of Ry., Airline & S.S. Clerks*, 78 Lab. Cas. ¶ 11,318 & app. (N.D. Ill. 1975) (awarding "a one-third premium" to the attorneys' hourly rate in labor-law case); *United Fed'n of Postal Clerks, AFL-CIO v. United States*, 61 F.R.D. 13, 19 (D.D.C. 1973) (awarding "incentive premium of 15%" in labor case); *Larionoff v. United States*, 365 F. Supp. 140, 147 (D.D.C. 1973) (awarding "a 10% premium" in a Tucker Act case); *Blankenship v. Boyle*, 337 F. Supp. 296, 302 (D.D.C. 1972) (enhancing award from $661,000 to $825,000 in breach of trust case).

this Court has observed, the two contexts are not identical. *Blum*, 465 U.S. at 900 n.16. Nonetheless, common-fund cases are instructive because they too involve the award of only "reasonable" attorney's fees. Moreover, Congress intended to ensure parity between awards in civil rights cases and other complex commercial cases where common-fund awards were (and remain) common, and expressly intended to avoid lower awards to civil rights vindicators "because the rights involved may be non-pecuniary in nature." S. Rep. No. 94-1011, at 6. After all, both sets of cases have common pre-*Alyeska* roots, and awards in both sets of cases must be "reasonable." *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Moreover, whatever subtle differences may exist between common-fund fee awards and civil rights attorney's fees, there is no plausible argument that "reasonable" in one context includes substantial enhancements while the same term in the other context categorically excludes any upward enhancement. That is especially true considering that Congress sought to preserve the pre-existing legal backdrop in Section 1988 and to ensure similar treatment for civil rights and other complex civil litigation. S. Rep. No. 94-1011, at 6.

Common-fund fee awards are determined in one of two ways: as a percentage of the recovery or via the lodestar method. Because courts often "crosscheck" the reasonableness of percentage-of-recovery awards by calculating the lodestar, the lodestar is relevant under either approach. The common-fund lodestar approach historically mirrored its counterpart under fee-shifting

statutes. *See Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) ("*Lindy I*"); *Grinnell*, 495 F.2d at 473. That approach has historically permitted upward adjustments for, *inter alia*, "the quality of an attorney's work." *Lindy I*, 487 F.2d at 168. While petitioners question *Lindy I*'s relevance because of its common-fund subject matter, Pet. Br. 30-31 n.15, they fail to note that courts of appeals used *Lindy I*'s approach in both fee-shifting and common-fund cases at the time of Section 1988's enactment. *See Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 298 (3d Cir. 1974); *Grunin*, 513 F.2d at 128.[4]

The percentage-of-recovery method is prevalent in common-fund cases. *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3d Cir. 2001). Even under that approach, courts frequently use the lodestar formula as a "crosscheck" to ensure the reasonableness of an award. *See, e.g., In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). In the crosscheck process, the district court calculates the lodestar and then divides the percentage-of-recovery award by the lodestar. Courts have frequently determined that

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[4] Petitioners attribute the inspiration for *Hensley*'s lodestar approach to *Lindy I* yet attempt to minimize the latter case's value. Pet. Br. at 30 & n.15. If indeed this Court took inspiration from *Lindy I*, then the case's reasoning surely bears on the question presented. And given the courts of appeals' adoption of *Lindy I* in fee-shifting cases, *Lindy I*'s common-fund heritage is not a sufficient ground to disregard the case.

lodestar multipliers between 1 and 4 represent "reasonable" attorney's fees. *See In re Prudential Insurance Co. Am. Sales Practice Litigation Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) (citation omitted). Courts have also approved even higher multipliers. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 & app. (9th Cir. 2002).

To reject all enhancements in the civil rights context, while enhancements remain common in complex civil litigation, would completely unmoor the Court's treatment of attorney's fees from congressional intent. Petitioners themselves suggest that the divergence in methods between the common-fund and fee-shifting cases arose only after this Court's decision in *Blum*—and, hence, did not form part of the legal backdrop against which Congress legislated when it expressed an intent to treat civil rights cases like other complex federal litigation. *See* Pet. Br. 30-31 n.15. To the extent that the dichotomy between common-fund and other cases was less pronounced at the time Congress legislated, that only strengthens the case for not eliminating enhancements altogether under Section 1988. It is clear that enhancements were available in both civil rights cases and complex commercial cases when Section 1988 was enacted and that Congress wanted to maintain parity between the two sets of cases. Allowing enhancements in commercial cases while categorically forbidding them under Section 1988 would thus completely sever this Court's jurisprudence from the legislative history and the legal backdrop against which Congress legislated.

C. Petitioners' "Windfall" Argument Misconstrues Congressional Intent

Against all the legislative history clearly indicating that Congress intended for enhancements to be available in "correctly" calculating a reasonable attorney's fee, petitioners point to a single word to support their contrary reading of the legislation: "windfall." Indeed, they invoke "windfalls" no fewer than 15 times in their brief. *See* Pet. Br. 13, 19-20, 24, 25, 28, 43, 53, 60. Petitioners' argument amounts to a faulty syllogism: Congress did not want windfalls; enhancements are windfalls; therefore, Congress did not want enhancements. But that syllogism rests on a flawed premise. Of course, Congress did not want windfalls—windfalls, like overcharges, "excessive fees," and "profiteering," are loaded words and undesirable. But petitioners' effort to equate enhancements with windfalls totally ignores what the legislative history actually says about enhancements, windfalls, and the policies underlying Section 1988.

1. While petitioners are correct that the committee reports frown on windfalls, *see* S. Rep. No. 94-1011, at 6; H.R. Rep. No. 94-1558, at 9, petitioners simply assume that all enhancements are windfalls. In doing so, they ignore the fact that the Senate Report cites cases in which enhancements were awarded—*Stanford Daily* and *Davis*—not only as exemplars of the correct calculation of a reasonable attorney's fee, but specifically as cases "which do *not* produce windfalls to attorneys." S. Rep. No. 94-1011, at 6 (emphasis added). As the report explains, "[t]hese

cases have resulted in fees . . . which *do not produce windfalls* to attorneys." *Id.* (emphasis added). That is utterly fatal to petitioners' argument that the committee reports' concern with windfalls means that no enhancements may be awarded.

Although petitioners quote in full the House Report's anti-windfall language, they only paraphrase the crucial portion of the Senate Report. Pet. Br. 20 (quoting H.R. Rep. No. 94-1558, at 9; citing S. Rep. No. 94-1011, at 6). And they assert that "the explicit statement of congressional intent that the Act was passed to attract competent counsel *without providing windfalls to attorneys* surely deserves more weight than citations to" *Stanford Daily* and *Davis*. Pet. Br. 24 (emphasis in original). That assertion is disingenuous because the report did more than cite *Stanford Daily* and *Davis*: it expressly stated that the awards there did "not produce windfalls."

Petitioners similarly assert that "the district court cases in the Senate Report were cited to emphasize that fee awards would again be available for civil rights actions in generally the same manner as in prior court decisions." Pet. Br. 27. That statement is true as far as it goes. But the Senate Report went further and stated that those cases "correctly applied" the *Johnson* factors and did "not produce windfalls." S. Rep. No. 94-1011, at 6.

Indeed, in rejecting a different artificial effort to limit attorney's fees, this Court observed in *Blum* that "[w]e cannot assume that Congress would endorse the standards used in *Johnson*, *Stanford*

Daily, *Davis*, and *Swann* if fee awards based on market rates were viewed as the kind of 'windfall profits' it expressly intended to prohibit." 465 U.S. at 895. That precise logic applies equally to enhancements. Because the Senate Report is so explicit about the absence of windfalls in its three exemplary cases, the methodology for correctly calculating an attorney's fee in those cases—including enhancements for superior performance and results—cannot produce a windfall that Congress intended to prohibit.

Petitioners' fixation on Congress' interest in avoiding windfalls suffers from a deeper flaw. Congress' desire to avoid windfalls reveals very little about the proper calculation of an attorney's fee that avoids windfalls. An award that produces a windfall is no more or less than an award that is *not* reasonable. The remainder of the legislative history is what makes clear whether a fee is a windfall or reasonable, and with respect to the specific question presented here—whether enhancements are categorically unreasonable windfalls—the answer is clear. As noted, Congress pointed to three exemplary cases, intended to ensure civil rights plaintiffs access to counsel, and wanted to ensure parity for attorney's fee awards in civil rights and other complex cases. *See* pp. 20-31, *supra*. Whatever the House and Senate Reports meant by windfalls, they surely did not mean that all enhancements are windfalls, that the enhancements in *Stanford Daily* and *Davis* were windfalls, or that enhancements routinely applied in complex commercial litigation are windfalls. To the contrary, those awards, including the

enhancements, were appropriate, correct, and necessary to attract high-quality counsel to civil rights cases.

2. In the end, petitioners' windfall argument represents nothing more than their view of good policy. But the answer to the question presented lies in ascertaining Congress' intent, not in devising an attorney's fee policy without regard to what Congress intended in enacting Section 1988. *See, e.g., Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 568 n.27 (1990). The Court has recognized that point in numerous other contexts, including questions arising under closely related statutes where the statutory text provides even less guidance. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Our role [in defining the contours of immunity not mentioned in the statutory text] is to interpret the intent of Congress in enacting [42 U.S.C.] § 1983, not to make a freewheeling policy choice." (alteration, citation, and quotation marks omitted)). Indeed, *Alyeska*, which prompted Section 1988's enactment, specifically acknowledged that "the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress," not the courts, "to determine." *Alyeska*, 421 U.S. at 262 (emphasis added).

Petitioners' policy argument that the lodestar should control except for the possibility of downward adjustments is especially illegitimate because it focuses on developments *after* Section 1988's enactment. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 595-96 & n.19 (1987). As petitioners

and this Court have acknowledged, although Congress was certainly aware of the possibility of calculating attorney's fees by multiplying hours worked by a reasonable hourly rate, the lodestar did not become firmly entrenched until *after* Congress enacted Section 1988. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); Pet. Br. 26-27. There is no justification for asserting that Congress actually adopted the lodestar as the exclusive basis for a "reasonable" fee, when the methodology gained traction only after the statute's enactment.

3. However, to the extent that post-enactment developments are relevant, the Court's subsequent clarifications of the meaning of prevailing parties ameliorates any concern that civil rights plaintiffs will be receiving windfalls. This Court has long made clear that fees are awarded only if a plaintiff prevails, and only *to the extent* that a plaintiff prevails on particular claims. *Hensley*, 461 U.S. at 434-36. More recently, the Court clarified that even if a lawsuit succeeds in inducing a defendant to change its conduct, the plaintiff will not receive fees if the defendant capitulated before the court entered a judgment on the merits or a consent decree. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 600 (2001). When a plaintiff survives those hurdles, fee awards are still not fully compensatory, let alone windfalls. Fee awards do not take into account the fact that attorneys whose payment is conditioned on success generally charge a higher rate than the lodestar allows in light of the risk of non-payment. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). And fee awards

do not compensate for some necessary costs, such as expert fees. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991). Here, plaintiffs' counsel had to bear more than $800,000 in expert fees. Pet. App. 169. Concerns that civil rights counsel are receiving windfalls, thus, can safely be put aside.

The "strong presumption" that the lodestar represents a reasonable attorney's fee, *see Dague*, 505 U.S. at 562, makes petitioners' policy concerns with windfalls even more fanciful. As this Court has made clear, there are numerous factors, such as contingency, that are not valid bases for enhancements. *Blum*, 465 U.S. at 898; *Dague*, 505 U.S. at 567. Moreover, under *Blum*, enhancements are permitted for superior work or results only "in the rare case where the fee applicant offers specific evidence to show that quality of service was superior" and "that the success was 'exceptional.'" *Blum*, 465 U.S. at 899 (citation omitted). In other words, it takes a rare case like this one—the highest degree of success and professionalism witnessed in the district court's nearly three decades on the bench, *see* Pet. App. 151-52—to secure an enhancement.

4. There was clearly no windfall on the facts of this case, although that issue is not properly before the Court. As noted, the question presented is whether a fee award can *ever* be enhanced for exceptional work and results. *See* p.16, *supra*. If so, the district court found that this is the rare case that warrants an enhancement, Pet. App. 154-55, and the court of appeals upheld that fact-bound determination, which is reviewed only for abuse of discretion, *id.* at 12-13. Under the "two-court rule,"

this Court does not ordinarily review factual determinations of both lower courts, and there is no reason to depart from that practice in this case. *See, e.g., United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). Indeed, this Court denied the second question presented in the petition, which asked whether the fee award was justifiable here in light of the district court's decision not to award fees for approximately 15% of the hours recorded by class counsel. *See* p. 16, *supra*. Especially in light of that limited grant, there is no reason to review the district court's fact-specific determination that this is the rare case.[5]

It is worth noting, however, that while petitioners repeatedly invoke the size of the fee award in this case, *see, e.g.*, Pet. Br. 26 n.13, 50-51, that award simply reflects the enormous effort and expense involved in litigating this case. This case was an enormous undertaking. The burden

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[5] Notwithstanding this Court's denial of the second question presented, petitioners argue that the district court's reduction in compensable hours is incompatible with its conclusion of superior performance and results. Pet. Br. 38-39. That question is clearly not before the Court. Moreover, there is no inherent tension between a reduction in hours and a finding of exceptional results, as exemplified by the legislative history's approval of *Davis*, in which the district court made a similar adjustment and enhancement. *See Davis*, 8 E.P.D. ¶ 9444, at 5048. Imprecise billing and excellent work product and results are simply different matters. Petitioners' reliance on *Delaware Valley I* is misplaced because the Court there cut the number of hours nearly in half—far in excess of the 15 percent reduction here. *Delaware Valley I*, 478 U.S. at 566-67.

inherent in child-welfare litigation becomes even greater when, as here, the opposing party fights vigorously on almost every imaginable issue. *See* Pet. App. 96; J.A. 37. As the district court explained, petitioners and respondents devoted comparable amounts of resources to the case. Pet. App. 148-49. Accordingly, this is precisely the kind of resource-intensive case where the attraction of quality counsel is a challenge and concerns about windfalls are wholly misplaced.

What the fee award really shows is that respondents' trial counsel had to make enormous outlays, both in time and out-of-pocket expenses, to mount this enormously successful effort. And as the district court observed, they have been required to bear those costs for years, and with no assurance of compensation. Pet. App. 151. While risk of nonpayment is not a basis for enhancing a fee award, *Dague*, 505 U.S. at 565, it surely blunts concerns about "windfalls," and the need to devote enormous resources in hopes of receiving reimbursement for a subset of expenses years later is a tremendous disincentive to accept a case like this. That disincentive is especially great in the biggest, most expensive cases like this one. Greater investments tend to impose greater opportunity costs on firms and reduce firms' willingness to handle such cases. *See* J.A. 58-59, 74-75. "If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large." *Missouri v. Jenkins*, 491 U.S. 274, 283 n.6 (1989). Petitioners'

obsession with "windfalls" simply ignores the reality of this and similar cases.[6]

Petitioners also argue that respondents should not receive an enhancement because they achieved their outstanding results through a consent decree. Pet. Br. 48-49. That decree, however, was the product of an enormous litigation effort, including more than 25,000 hours of time that the district court found to be fully compensable.

II. THIS COURT HAS ALREADY REJECTED PETITIONERS' NO-ENHANCEMENTS POSITION

Petitioners' position that Section 1988 prohibits "any type of enhancement to the attorney's fee

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[6] Petitioners argue that delay in payment is generally compensated by using current hourly rates as opposed to attorneys' hourly rates at the time they performed the work. Pet. Br. 56-57 (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)). That question is not directly presented here because the court of appeals affirmed solely on the basis of the exceptional quality of work and results obtained, and this Court limited its review to that question. Pet. App. at 70 (Carnes, J.); Pet. (i); *see also* U.S. Br. 25. Nonetheless, using current hourly rates is not the *only* permissible method of compensating for delay. *See* Pet. App. 85 (Wilson, J., concurring). This Court has authorized "an appropriate adjustment for delay in payment—whether by application of current rather than historic hourly rates *or otherwise*." *Jenkins*, 491 U.S. at 283-84 (emphasis added). Especially as some lawyers' hourly rates are *dropping* in this recession, it would make little sense to treat current rates as the only permissible way of compensating for delay. Moreover, using current rates does not account for delay in payment of reimbursable out-of-pocket expenses, which were significant here.

award," Pet. Br. 13, cannot be reconciled with this Court's case law. This Court heard and expressly rejected the categorical no-enhancements position that petitioners resurrect in this case. *See Blum*, 465 U.S. at 897, 901. That was not mere dictum: the rejection at the threshold of the categorical argument that enhancements are never available for superior performance or results was the necessary predicate for the remainder of the Court's opinion. Moreover, over the course of several cases, this Court has consistently confirmed that calculation of the lodestar does not end the inquiry, and that enhancements are available in the rare case. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 738 n.26 (1986); *Blanchard*, 489 U.S. at 94; *Delaware Valley I*, 478 U.S. at 566-68. Contrary to petitioners' assertion, Pet. Br. 32, the Court's pronouncements in those cases are not stray dicta but represent both the holding in *Blum* and a measured and reasoned rejection of arguments actually presented to the Court. Numerous courts of appeals have read this Court's decisions in that manner. Pet. App. 177-78 (Wilson, J., concurring in denial of rehearing) (citing cases). To accept petitioners' proposed ban on enhancements would require the Court to overrule *Blum*—an extreme position petitioners have not even attempted to justify by reference to considerations of *stare decisis*.

A. This Court Held In *Blum* That Enhancements, Like Downward Adjustments, Are Appropriate At Least In Rare Cases

1. Beginning with *Hensley* in 1983, the Court adopted the lodestar calculation as a "useful starting point" and "an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. at 433. In keeping with the clear import of the committee reports, however, the Court stressed that calculating "reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee *upward or downward*, including the important factor of the 'results obtained.'" *Id.* at 434 (emphasis added). The Court reiterated that "in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

Although the facts of *Hensley* involved only a downward adjustment, the Court carefully established the analytical approach it has used ever since. And the Court's recognition that the lodestar was a "starting point" that may be either enhanced or reduced was by no means superfluous to its decision. As noted, the availability of enhancements (and reductions) is necessary to make this Court's lodestar jurisprudence a valid exercise of statutory construction, as opposed to an exercise in policy making divorced from Congress' intent. The committee reports, which *Hensley* carefully reviewed and followed, 461 U.S. at 429-31, 434-35, make clear that the inquiry is a multi-factored one in which the lodestar is not dispositive.

For essentially these reasons, in *Blum* the Court expressly rejected the contention that lodestars may never be enhanced. *Blum*, 465 U.S. at 897, 901. The district court in that case awarded a 50 percent enhancement "because of the quality of the representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class' that was achieved." *Id.* at 891. The petitioner in *Blum* challenged the fee on two grounds: first, that "any upward adjustment of [the lodestar] is improper"; and second, that the 50 percent enhancement was unreasonable on the facts of the case. *Id.* at 896. Relying on *Hensley* and the Senate Report, the Court definitively rejected the first, categorical argument: "In view of our recognition that an enhanced award may be justified 'in some cases of exceptional success,' we cannot agree with petitioner's argument that an 'upward adjustment' is never permissible." *Id.* at 897. Rather, the lodestar may "result[] in a fee that is either unreasonably low or unreasonably high." *Id.*

After rejecting the *Blum* petitioners' categorical argument, the Court went on in a separate section of the opinion to reverse the enhancement in that case because the record "contain[ed] no evidence supporting an upward adjustment." *Id.* at 898. Importantly, though, the Court expressly held that quality of representation "may justify an upward adjustment . . . in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was

'exceptional.'" *Id.* at 899 (citing *Hensley*, 461 U.S. at 435).

Blum cannot be dismissed as mere dictum. The very issue in *Blum* was "*whether*, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988." 465 U.S. at 889 (emphasis added). Presented squarely with the "whether" question, the Court answered it in the affirmative by "reject[ing] petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988." *Id.* at 901.

Nor was that a passing reference. The Court carefully considered—in a separate section of the opinion—petitioner's argument that all enhancements were verboten. And just as carefully, the Court reasoned that fee enhancements are a permissible, if relatively rare, feature of the attorney's fee regime Congress enacted. *Id.* at 897. The Court then went on to formulate the legal standard for when enhancements on the basis of quality of representation and results obtained are appropriate, and to specify the nature of the evidentiary showing necessary to support such an enhancement. *Id.* at 899. That the award in *Blum* failed to meet that standard does not render the Court's rejection of the no-enhancements position, and adoption of a controlling legal standard for awarding enhancements, dictum. To the contrary, the Court's rejection of the fee award there was an application of the holding of the case allowing such enhancements but only in specific circumstances with sufficient evidentiary support.

2. Acceptance of petitioners' position would require the Court to overrule *Blum*, but petitioners neither acknowledge the need for *Blum*'s overruling nor seek to justify that extreme step. Petitioners are not the first to disagree with *Blum*, but at least those who took issue with *Blum* earlier acknowledged the need to overrule or supersede it and directed their argument to Congress, the proper body to provide relief from decisions of this Court interpreting statutes.

In the wake of *Blum*, Congress twice recognized its significance. When Congress enacted a new fee provision governing claims brought under the IDEA, it specifically prohibited enhancements. 20 U.S.C. § 1415(i)(3)(C). The conference committee report makes clear that Congress understood that enhancements were permitted under *Blum* and *Hensley*, and that it sought to preclude them under the new IDEA provision but did "not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to *other* statutes such as 42 U.S.C. 1988." H.R. Conf. Rep. No. 99-687, at 2 (citing, *e.g.*, *Hensley*, 461 U.S. 424; *Blum*, 465 U.S. 886) (emphasis added).

Some Members of Congress did introduce legislation to change the rule under Section 1988 and overrule *Blum* by providing that "multipliers shall not be used in calculating awards of attorney's fees." Legal Fee Equity Act, S. 2802, 98th Cong. § 6(a)(2) (1984); *see also Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 98th Cong. 4-5 (1985) (prepared

statement of Sen. Orrin G. Hatch) (stating that existing fee-shifting statutes have "resulted in the award of excessive fees . . . some courts have even used 'multipliers' to double or triple an attorney's customary hourly rate"). But that legislation, unlike Section 1988 and the IDEA, was not enacted into law. The enactment of the IDEA provision, and the introduction and rejection of legislation that would have overruled *Blum*, confirm that petitioners seek relief that is contrary to *Blum* and would require either this Court to overrule *Blum* or Congress to amend the statute.

Petitioners do not ask this Court to overrule *Blum*, let alone seek to justify that result. Presumably, that is because any effort to justify overruling a statutory interpretation decision of this Court would founder on the heavy preference for *stare decisis* and continuity in statutory cases. *See, e.g., John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008). *Hensley* and *Blum* are decades old, and there is no indication that they have proven to be unworkable. Upward enhancements have remained confined to "rare" cases and have not proven difficult to administer. There is no justification for this Court to overrule *Blum*. Those who disliked *Blum* immediately after it was issued picked the right forum (Congress) for voicing their policy arguments and seeking to have the rule of *Blum* replaced. That effort having failed, there is no justification for this Court to overrule *Blum* at this late date.

B. Decisions After *Blum* Do Not Undermine Its Holding Or The Validity Of Enhancements

This Court's decisions after *Blum* only reinforce *Blum*'s holding that upward enhancements for superior work and results are permissible in rare cases when supported by specific evidence. The subsequent cases repeated this Court's holdings that enhancements are permissible in such circumstances, and did not overrule them.

While petitioners argue that *Delaware Valley I* precluded such enhancements, that case simply reaffirmed *Blum* and held that an enhancement was not appropriate on the facts of that case. 478 U.S. at 566-68. Petitioners quote out of context the Court's statement that *Blum* had held that "the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Id.* at 565. Read in isolation, that statement appears self-contradictory because it first notes that quality and results are only "presumably," as opposed to invariably, reflected in the lodestar (as *Blum* had held), but then goes on to suggest that an enhancement is never appropriate on that basis. When considered in the context of *Blum*, however, the Court's admonition is clear: enhancement based on those factors, because they are presumably compensated by the lodestar, depends on specific evidence and detailed findings. Indeed, the opinion immediately goes on to confirm that "upward adjustments of the lodestar are still permissible . . . in certain 'rare' and 'exceptional'

cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id.* (quoting *Blum*, 465 U.S. at 898-901).

Then, when the Court specifically turned to considering an enhancement based on exceptional performance—*i.e.*, when the Court actually addressed the question relevant here—it explained that "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation *normally* are reflected in the reasonable hourly rate, the overall quality of performance *ordinarily* should not be used to adjust the lodestar." 478 U.S. at 566 (emphases added). The Court then determined that an enhancement was inappropriate on the record of *that* case because there was no "evidence" that the lodestar failed to reflect the quality of performance, there was no "specific evidence" that the results were "outstanding," and the district court made no "detailed findings as to why the lodestar amount was unreasonable." *Id.* at 567-568. That inquiry would have been unnecessary and inappropriate if the Court had meant that quality and results are always reflected in hourly rates and never warrant an enhancement. Thus, the *Delaware Valley I* Court's articulation of the controlling legal standard and its application of that standard to the facts of that case are fully consistent with the district court's articulation and application of the same standard in this case. Indeed, *Delaware Valley I* involves an application of the legal standard adopted in *Blum*. Certainly, nothing in *Delaware Valley I* either overrules *Blum* or suggests that the presumption in favor of the

lodestar is not only strong in theory, but also fatal to any enhancement in fact. *Cf. Johnson v. California*, 543 U.S. 499, 514 (2005) (noting that even "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" (citation omitted)).

This reading of *Delaware Valley I* is confirmed by subsequent decisions. For example, three years later, the Court reiterated that "courts may . . . adjust this lodestar calculation by other factors" in rare cases when supported by specific evidence. *Blanchard*, 489 U.S. at 94 (noting "[t]he *Johnson* factors may be relevant in adjusting the lodestar amount").

Similarly, in *Dague*, the Court eliminated contingency as a basis for enhancing a fee award, but confirmed that fee applicants may obtain "more than" the lodestar figure in appropriate cases. *See Dague*, 505 U.S. at 562. While petitioners rely heavily on *Dague*, it does not support their position. *Dague* preserved enhancements on grounds other than contingency, *see id.* at 562, which, of course, excused the Court from the impossible task of explaining how a regime of no enhancements for any reason could be squared with either Congress' intent or *Blum*. Though *Dague* assessed the reasonableness of fees, its analysis builds on *Hensley* and the meaning of "prevailing party" under Section 1988. If a party cannot recover for unsuccessful claims in an otherwise successful litigation, *see Hensley*, 461 U.S. at 435-36, it certainly cannot recover fees to compensate for unsuccessful claims in *other* cases, which is essentially what the Court viewed a contingency

enhancement as permitting. *Dague*, 505 U.S. at 565.

As *Dague* explained, "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail." *Id.* at 565 (emphasis in original). Thus, "just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost . . . so should it bar a prevailing plaintiff from recovering for the risk of loss." *Id.* (citing *Hensley*, 461 U.S. at 435).[7]

Dague also recognized that permitting enhancements for contingency would be an exception that swallowed the rule. In any Section 1988 case, contingency is "a factor that *always* exists (no claim has a 100% chance of success), so

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[7] The Court also reasoned that its decision in *Blanchard* counseled against permitting contingency enhancements. *Blanchard* held that the lodestar controls a fee award, even where a plaintiff's contingency agreement with his counsel would have provided a lower fee. 489 U.S. at 96. Allowing contingency enhancements, the Court concluded, would have "concoct[ed] a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it." *Dague*, 505 U.S. at 566. So too here, petitioners' approach would concoct a similarly asymmetrical and hybrid scheme that would permit reductions but not enhancements to the lodestar. *See* pp. 58-60, *infra*.

that computation of the lodestar would never end the court's inquiry in contingent-fee cases." *Id.* at 563 (emphasis in original). Recognizing an automatic contingency enhancement, thus, would be in tension with *Hensley* and *Blum*'s reservation of enhancements for rare cases. Enhancements for superior work and results obviously do not share that defect. Because contingency is different in kind from superior representation and outstanding results, *Dague* does not call *Blum* into question, much less overrule it.

C. This Court's Rejection Of Some Kinds Of Enhancements Makes It Imperative To Reject Petitioners' Categorical Approach

Because Congress clearly contemplated enhancements, as discussed above, the Court's rejection of some bases for enhancements only underscores the need to retain others, lest the Court's attorney's fees jurisprudence become completely unmoored from Congress' intent. For example, *Blum* rejected "complexity" and "novelty of the issues" as grounds for enhancing the lodestar figure, 465 U.S. at 898-99, and *Dague* eliminated contingency as a factor, 505 U.S. at 567. Petitioners suggest that this Court should continue that trend by precluding *all* enhancements. Pet. Br. 42, 51-52. Perceived momentum in this Court's jurisprudence is not, however, a decisional principle. And, indeed, continuing the trajectory of recent decisions to the point of precluding all enhancements based on exceptional quality or results would produce an attorney's fees regime that cannot be reconciled with Congress' intent.

As discussed above, Congress expressly embraced fee enhancements at least in some circumstances. Thus, even as this Court has adopted a strong presumption that the lodestar is a reasonable fee, it has always recognized that enhancements are permissible at least in rare cases. As noted above, that recognition is necessary to remain faithful to congressional intent, which is why the lodestar system, from *Hensley* through today, has always permitted some enhancements. *See* pp. 41-51, *supra*.

If fee enhancements are appropriate in some circumstances, the most logical bases for enhancements are superior representation and outstanding results. The legislative history endorses those very bases for enhancement. Quality and results are what clients care most about. And this Court has repeatedly held these factors out as the appropriate bases for enhancement. *See* pp. 43-44, 47-48, *supra*.

The United States attempts to finesse congressional intent by suggesting that enhancements may be appropriate for attorneys who represent uniquely unpopular clients. U.S. Br. 30. Limiting enhancements to that vanishingly small class of cases is no more consistent with congressional intent than eliminating them altogether. And it is equally unfaithful to *Blum*. Nothing in the legislative history or legal backdrop of the legislation suggests that enhancements are appropriate in that situation and only that situation. Instead, the examples of enhancements in the Senate Report include *Stanford Daily* and *Davis*, both of which awarded enhancements for

superior representation and outstanding results—and it is hard to imagine that the Stanford Daily qualifies as an unpopular client. There is no basis for limiting enhancements to the miniscule (if not entirely hypothetical) remnant the United States finds acceptable.

D. Superior Representation And Outstanding Results Are Not Necessarily Taken Into Account In The Lodestar Calculation

Petitioners argue that the lodestar is conclusive here because it necessarily takes into account superior performance and results. Pet. Br. 43-44, 54-55. That is incorrect as a factual matter and irrelevant as a legal matter. It clearly provides no basis to overcome this Court's cases and Congress' manifest intent to permit enhancements based on those criteria.

1. First, the reasonable rate component of the lodestar is generally based on *expectations*, not results. Prevailing rates are a forward-looking measure that represents the attorney's experience and the level of skill expected. Skill and experience, however, do not necessarily translate into superior representation—a factor measurable only *after* the representation has occurred. *See, e.g.*, *Merola*, 493 F.2d at 298 ("The end result—an amalgam of expected value and delivered performance—represents a reasonable fee under normal circumstances."). Hence, *Blum* recognized that quality of representation "may justify an upward adjustment" where "the quality of service rendered was superior to that one reasonably

should expect in light of the hourly rates charged . . . ." 465 U.S. at 899 (emphasis added); *see also Lindy*, 540 F.2d at 117-18. The reality is that not all lawyers who charge the same rate deliver the same quality of representation, and that even the same lawyer does not obtain equivalent quality or results in all cases.

Petitioners argue that, if performance exceeds expectations, the hourly rate (and not the lodestar) should be adjusted upward. Pet. Br. 54-55. Under that approach, a court would evidently enhance the hourly rate before calculating the "lodestar" (really, a pre-enhanced lodestar), instead of calculating the lodestar and then applying an enhancement. But the end result would be the same—whether the hourly rate or the lodestar is enhanced, there is still an enhancement.

Thus, the only practical consequence of petitioners' proposed alternative would be to make the fee calculation less transparent. To promote objectivity, this Court has long required use of "the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. Enhancing those rates instead of enhancing a traditional lodestar calculation would only make the process more opaque, which would benefit no one. In any event, class counsel certainly cannot be faulted for following the traditional approach of requesting an enhancement to the lodestar as opposed to their hourly rates.

2. A lodestar-only approach would also ignore the reality that the lawyer's practice is often one of creativity and imagination. The most difficult legal

problems cannot be solved by blunt force or endurance. "The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject-matter." *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749, 750 (S.D.N.Y. 1930). Brilliant insights and timely maneuvers are not always time consuming. Moreover, pathmaking and uniquely successful litigation may be the product of critical insights, not long hours or senior lawyers. *Cf. Heller v. Dist. of Columbia*, No. 03-cv-00213-EGS (D.D.C. May 6, 2009) (fee proceedings stayed pending this Court's decision in this case).

Thus, fee agreements entered into between highly sophisticated clients and counsel do not universally call for billing based solely on hourly rates. Instead, retention agreements sometimes call for increased payments, in addition to hourly rates, in the event that the lawyers perform especially good work or find a way to succeed in an especially efficient manner. *See, e.g.*, "Sample Engagement Agreement," *available at* http://www.mlmins.com/Documents/SiteContent/f18ec30b-7e26-4c75-b887-7ece040256aa.pdf (last visited Aug. 18, 2009). This practice pre-dates Section 1988, *see, e.g., Knapp v. McFarland*, 457 F.2d 881, 883 (2d Cir. 1972) (quoting fee agreement providing for adjustment based on good results), and the trend is clearly toward the greater use of such enhancements. Indeed, the word on the street is that the billable-hour model is either dead or seriously wounded. *See* Steven T. Taylor, *Creative,*

Trail-Blazing Chicago Firm Seeks to Banish the Billable Hour, Of Counsel, August 2009, at 3; Jim Hassett, *Hybrids and the Future*, Of Counsel, May 2009, at 5; Johnathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. Times, Jan. 30, 2009, at A1.

To be sure, Section 1988 does not replicate private fee arrangements in all respects. *Delaware Valley I*, 478 U.S. at 565. But such arms-length agreements, of highly sophisticated parties, demonstrate that quality of work is not always encompassed in rates and hours worked.

3. Likewise, outstanding results do not necessarily factor into the lodestar. While petitioners repeatedly contend that hourly rates reflect results obtained, *see, e.g.*, Pet. Br. 43-44, clients can only wish that were universally true.

Moreover, there is no dispute that adjustments are permitted based on results obtained because this Court has held that *limited* success may warrant a *downward* adjustment of the lodestar. *Hensley*, 461 U.S. at 436. Parallelism demands that the "results obtained" factor not be a one-way ratchet. *Cf.* pp. 20-26, *supra*. Courts should have discretion to increase as well as decrease the lodestar when the results warrant an adjustment.

The marketplace again reflects that reality. Fee arrangements between sophisticated clients and counsel sometimes provide for payment beyond hourly rates for achieving remarkable results, as well as superior work. *See, e.g.*, "Sample Engagement Agreement," *available at* http://www.mlmins.com/Documents/SiteContent/f1

8ec30b-7e26-4c75-b887-7ece040256aa.pdf (last visited Aug. 18, 2009).

4. In any event, the fact remains that a lodestar-only system (or, more accurately, a lodestar-and-only-downward-adjustments system) is not consistent with Congress' manifest intent. Even if a lodestar-only approach were a brilliant and perfect method of determining fees (which it is not), Congress chose instead to ratify the pre-existing legal regime, which permitted enhancements. Significantly, the lodestar was never considered a single-step inquiry, and at the time of and shortly after Section 1988's enactment, *every court* applying the lodestar formula permitted upward or downward adjustments. *See, e.g.*, *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980) (stating lodestar "is adjusted upward or downward"); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc) (noting "the 'lodestar' may be adjusted up or down to reflect 'the quality of representation'").

Consistent with Congress' intent and the legal backdrop against which Congress legislated, this Court has found the lodestar to be an efficient way to capture most of the *Johnson* factors most of the time. But categorically precluding enhancements based on exceptional quality and results would completely sever this Court's lodestar jurisprudence from congressional intent.

III. PETITIONERS' POSITION IS PROFOUNDLY MISGUIDED

Although ultimately irrelevant to the question presented to this Court and better directed to

Congress, petitioners expend considerable effort extolling the policy benefits of their proposed categorical approach. *E.g.*, Pet. Br. 47-51. In fact, petitioners' favored approach is not only not the policy Congress enacted in Section 1988, but bad policy in any event.

1. The most obvious consequence of petitioners' approach is to turn adjustments into a one-way (downward) ratchet. Under that approach, the lodestar would represent not a presumptive starting point but a ceiling. The best an attorney could reasonably hope for would be to recover the hourly rate normally charged in cases where payment is not contingent on success. And the attorney would have every expectation of recovering less, based on the numerous bases for reducing an award or denying recovery altogether. *See* pp. 36-37, *supra*. That approach could not help but systematically undercompensate civil rights counsel.

Petitioners are correct that a lawyer who takes on representation of a civil rights plaintiff has an ethical duty to provide the best service possible. A lawyer does not, however, have an ethical obligation to expand a representation of an individual plaintiff into a class action that seeks system-wide reform. And ethical obligations hardly translate by their own force into top-flight representation. It is no secret that some lawyers are better than others and that lawyers, like everyone else, perform better on some occasions than others. Moreover, ethical duties attach only *after* representation begins, a fact petitioners overlook. The imbalance in incentives would surely

affect the number and quality of attorneys who offer their services in civil rights litigation. It would also affect the mix of cases lawyers accept. A skewed regime of systematic undercompensation will make it particularly difficult to take on the enormous burden that successful vindication of the rights of children in a child welfare system necessarily entails.

Petitioners assert that as long as the class here obtained counsel, no enhancement is necessary. But that ignores the fact that enhancements for exceptional work and results *are* available under existing law (and clearly were available in the Eleventh Circuit, *see* Pet. App. 57-63 (Carnes, J.)). In any event, it is immaterial that any given civil rights plaintiff has found competent counsel; those who do not secure counsel will not come to the judicial branch's attention.

It is true that enhancements are never guaranteed at the outset of a case, but the possibility of securing one provides an additional incentive for counsel to take a case—an incentive that helps offset the disincentives created by the multiple limitations on recovering even a lodestar amount. Indeed, any fee recovery is speculative because it depends on prevailing through final judgment and other matters that cannot be known ex ante. *See* pp. 36-37, *supra*. Thus, the fact that an enhancement (or any other aspect of recoverable fees) is speculative ex ante hardly negates its ability to provide an incentive to handle civil rights cases, especially extraordinarily expensive ones like this.

The bottom line, however, is that *Congress* already determined that enhancements *are* appropriate to help attract counsel in these cases. It is not for petitioners to question Congress' determination.

2. Petitioners' contentions that enhancements would discourage settlements and are otherwise problematic have nothing to do with ascertaining congressional intent and are wrong in any event. The availability of an enhancement does not depend on whether a plaintiff prevails in a consent judgment or after trial. And a pre-trial settlement like the one in this case *reduces* fee awards by bringing the litigation to a close before the substantial expenses of a trial.

Administrability cannot be the primary consideration in determining what is reasonable. If it were, the simplest approach would be to remove all discretion from a district court and adopt a flat fee for civil rights cases. Instead, Congress authorized "reasonable" fees and embraced the *Johnson* factors. Neither action suggests an obsession with administrable bright-line rules. *See* pp. 17-19, *supra*. Moreover, concerns about administrability lose considerable steam given that the "strong presumption" attached to the lodestar makes enhancements available only in rare situations. *See Blum*, 465 U.S. at 897. For over three decades since the passage of Section 1988, courts have calculated the lodestar amount, considered whether other factors warranted an upward or downward adjustment, and occasionally enhanced a fee award based on those

considerations. Petitioners point to no discernible damage to the legal system from such awards.[8]

3. Finally, it bears emphasis that petitioners' categorical approach would enshrine the billable hour *über alles* at precisely the moment that the legal profession is moving away from it. Billing by the hour is certainly not inherent in the practice of law. Instead, as this Court has acknowledged, the lodestar achieved ascendance only recently, and only *after* Section 1988's enactment. *See Gisbrecht*, 535 U.S. at 801. And the heyday of the billable hour appears to have already passed. The legal profession is increasingly moving away from the billable hour, and accounts of the billable hour's demise are prevalent, if perhaps a bit premature. *See* p. 56, *supra*. The inflexible approach taken by petitioners would carry Section 1988 against this tide, revealing the dangers of basing statutory interpretation on policy preferences or temporarily prevailing practices among attorneys rather than Congress' intent at the time it enacted the legislation.

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[8] Petitioners argue that enhancements pose a "candor issue" because, for example, a defendant might argue during the underlying litigation that it was clearly right and then argue during the fee litigation that it had been clearly wrong and that the result was nothing special. Pet. Br. 45-46. That "side-switching" phenomenon is inherent in the attorney's fee context and is not unique to enhancements. Lodestar disputes about how many hours a prevailing party should have worked on opposing a motion involves the exact same incentives.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In The
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SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents spend a significant portion of their brief arguing an issue that is not before this Court: whether an enhancement to the lodestar can ever be awarded *for any reason*. (*See, e.g.*, Resp. Br. 13, 17-18, 21, 31, 40-41, 51.) However, the question presented and the corresponding argument made by Petitioners focus *solely* on whether an attorney's fee award can ever be enhanced for the factors of quality of representation and results obtained when these factors are already included in the lodestar. Because Respondents are understandably concerned that this Court's precedents are decidedly trending in the direction of answering this limited question in the negative, they attempt to alter the answer by improperly broadening the question presented and putting words into Petitioners' mouths.[1]

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[1] Time and again throughout their brief, Respondents berate "[P]etitioners' proposed ban on enhancements" in the apparent belief that by repeating this misrepresentation of Petitioners' position enough, they can make it so. (Resp. Br. 12-13, 16, 25, 40-41, 51.) Petitioners have not before and do not now argue for a "ban on enhancements" in all circumstances; their argument (and the subject of the Court's grant of *certiorari*) is that the two factors of results obtained and quality of representation cannot, on their own, support an enhancement to a fee award because those factors are subsumed within the lodestar. Indeed, the very pages from Petitioners' Brief that Respondents cite for their contention that Petitioners seek to preclude *all* enhancements in fact specifically limit the issue to results obtained and quality of representation, as stated in the

(continued on following page)

Respondents' arguments, like their attempt to reframe the issue in this case, lack merit. First, Respondents contend that Congress could not have intended to bar any type of enhancement to the lodestar from being awarded to prevailing parties in Section 1988 cases because there was no such thing as a lodestar when the statute was enacted and two of three cases cited by a committee of one chamber of Congress approved an increase to the base fee award. (Resp. Br. 19, 22.) This argument, if accepted, would mean that no less than four of this Court's decisions in this area have been wrongly decided. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding that the product of reasonable hours times reasonable rate, or what has become known as the "lodestar," presumably produces a reasonable fee within the meaning of Section 1988); *Blum v. Stenson*, 465 U.S. 886, 898 (1984) (concluding that neither complexity nor novelty of the issues is an appropriate factor for increasing the lodestar); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) ("*Delaware Valley I*") (determining that enhancements for superior performance are unnecessary to serve the statutory purpose of enabling plaintiffs to secure legal assistance); *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) (concluding that enhancing the lodestar for contingency is never permitted). While this Court has not held that

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question presented. (Resp. Br. 16, 40-41, 51 (citing Pet. Br. 13, 42, 51-52).)

Congress intended to prohibit enhancements *in toto*, it has found that there is nothing in the legislative history mandating the use of enhancements for results obtained or quality of representation. Indeed, enhancement of a fee award for the very factors that are subsumed within an attorney's reasonable hourly rate and reflected in the number of hours expended flies in the face of Section 1988's purpose and is contrary to this Court's fee-shifting attorney's fees precedent over the past quarter century.

Second, Respondents contend that because enhancements are granted in common fund cases in commercial litigation, then they should likewise be permitted for results obtained and quality of representation in Section 1988 cases. (Resp. Br. 26-31.) Respondents are again attempting to argue a question not before this Court but also one that was squarely rejected by the District Court and affirmed by the Court of Appeals. (Pet. App. 14, 106-11.) This Court also has distinguished between the calculation of attorney's fees under the common fund doctrine and fee-shifting statutes.

Finally, Respondents urge this Court to minimize or discard the lodestar method of determining a reasonable attorney's fee in favor of alternative billing arrangements used by some lawyers in the current recession. However, the reality is that the use of a reasonable hourly rate multiplied by the reasonable hours expended on a case continues to compensate adequately civil rights attorneys such as Respondents' counsel for the quality of their

representation and the results obtained in current economic times.

ARGUMENT

I. Nothing in the Language of 42 U.S.C. § 1988 Nor Its Legislative History Indicates That Congress Intended to Sanction an Enhancement to an Attorney's Fee Award for Either Results Obtained or Quality of Representation, a Position Confirmed by This Court's Decisions.

In their effort to recast the question presented, Respondents assert that Congress did not intend to foreclose all enhancements to an attorney's fees award by its enactment of 42 U.S.C. § 1988. (Resp. Br. 17.) Nothing, however, suggests that Congress intended Section 1988 to authorize the multiplying of an otherwise reasonable attorney's fee award by some indeterminate percentage based solely upon the excellence of counsel's representation or the breadth of the results obtained in the litigation.

Section 1988 provides that a "reasonable attorney's fee" may be allowed a prevailing party, but does not provide how that fee should be determined. Both the House and the Senate Reports agreed on two matters with respect to this determination: (1) at the time of the enactment of Section 1988, the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974),

had been utilized to determine the reasonableness of fee awards, and (2) a fee award should be sufficient *to attract competent counsel* without providing windfalls to attorneys. *See* H. Rep. No. 94-1558, at 8-9 (1976); S. Rep. No. 94-1011, at 6 (1976). Section 1988 neither provided for an enhanced award for attracting "competent-plus" counsel nor indicated that fees should be awarded on some sliding scale based on the quantum of relief awarded to a prevailing party. *Johnson* itself does not stand for or suggest that the quality of counsel's representation or the results obtained should be the subject of a separate or additional award. "The [Title VII] statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation." 488 F.2d at 719.

Not surprisingly, Respondents fixate on two cases cited in the Senate Report (but not in the House Report) as examples in which the *Johnson* factors were "correctly applied": *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), and *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974). (Resp. Br. 22-25, 32-34; *see also* S. Rep. No. 94-1011, at 6 (1976).) The court in *Stanford Daily* actually awarded an enhancement for three combined factors: contingency, quality of the attorney's work, and results obtained, but the baseline amount in that case was computed using an "appropriate average hourly rate," as contrasted with

a "reasonable" or "market" hourly rate. 64 F.R.D. at 685. The court in *Davis* awarded an amount above the "normal hourly rates" due to the excellent results achieved. 8 Empl. Prac. Dec. (CCH) ¶ 9444. Respondents, as well as many of their supporting *amici*,[2] conclude that the citation of these two cases in the Senate Report constitutes a clear indication of congressional approval for enhancement of attorney's fee awards due to quality of representation and results obtained. (Resp. Br. 23.)

Several problems undermine Respondents' conclusion. First, Respondents fail to discuss in any detail the third case cited in the Senate Report, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), where the court *reduced* a fee request that the district court specifically found was reasonable to a lower amount, despite the "excellent" results obtained and "exceptional" ability of plaintiffs' counsel. 66 F.R.D. at 484, 486. Given the divergence of the rationales and conclusions reflected in the three cases cited in the Senate Report, the cases provide no definitive indication of the Senate's intent. Moreover, given the fact that the Report of the House Committee on the

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[2] *See* Small Private Law Firms *Amicus Curiae* Br. Supp. Resp. 6; NAACP Legal Defense & Educ. Fund, Inc. *Amicus Curiae* Br. Supp. Resp. 7, 25; Liberty Legal Inst., *et al. Amicus Curiae* Br. Supp. Resp. 12; New York State Bar Ass'n, *et al. Amicus Curiae* Br. Supp. Resp. 5 n.2; Amer. Ass'n for Justice, *et al. Amicus Curiae* Br. Supp. Resp. 16.

Judiciary fails to mention *any* of these three cases,[3] it is highly questionable whether any significance can be placed on their citation in the Report of the Senate Committee on the Judiciary, particularly because it is not an authoritative expression of the intent of the Congress. *See Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ("[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."), *cited in United States v. X-Citement Video*, 513 U.S. 64, 77 n.6 (1994); *United States v. Seeger*, 380 U.S. 163, 177 (1965) ("[A]n explicit statement of congressional intent deserves more weight than the parenthetical citation of a case [in a Senate Report] which might stand for a number of things.").

What is clear from the legislative history is that Congress considered a reasonable fee to be one sufficient *to attract competent counsel*, but no more. It was certainly suggested that courts should employ the *Johnson* factors in making reasonable fee awards, that fees should reflect time reasonably expended on a matter, and that fee awards should not be reduced because the relief sought is non-pecuniary in nature. *See* H. Rep. No. 94-1558, at 8-9 (1976); S. Rep. No.

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[3] Indeed, the two cases cited in the House Report in support of using the *Johnson* factors make no mention of enhancements to a fee award for quality of representation or results obtained. *See* H. Rep. No. 94-1558, at 8 (citing *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974), and *U.S. Steel Corp. v. United States*, 519 F.2d 359 (3d Cir. 1975)).

94-1011, at 6 (1976). However, nothing in the statute or the legislative history instructs courts how to apply the *Johnson* factors so as to convert them to dollars in a reasonable fee award, nor is there anything to indicate that the determination of a reasonable fee should be enhanced based on factors of quality of representation or results obtained.[4]

Second, contrary to Respondents' assertion, this Court has never cited the Senate Report as authorization for an enhancement to the lodestar for superior work and results. (Resp. Br. 23-24.) In *Hensley*, the three cases referenced in the Senate Report were cited to support the proposition that "[t]he legislative history . . . does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success." 461 U.S. at 431. In *Blum*, the cases were cited to support the determination of hourly rates based upon prevailing market rates rather than a cost-based standard. 465 U.S. at 894-95. In *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986), the cases were cited to confirm congressional intent that reasonable fees can be awarded even though plaintiffs do not seek monetary damages. In *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989), the cases were cited only for confirmation of Congress'

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[4] In fact, this Court has instructed that the *Johnson* factors are generally subsumed in the lodestar calculation, typically as a determination of the reasonable hourly rate. *See Dague*, 505 U.S. at 562; *Delaware Valley I*, 478 U.S. at 564-66; *Blum*, 465 U.S. at 898-900; *Hensley*, 461 U.S. at 434 n.9.

intent that the *Johnson* factors provide guidance in assessing the reasonableness of a fee award.

Third, Respondents' contention that Congress authorized enhancements to fee awards based on individual *Johnson* factors contradicts this Court's prior decisions that have eliminated the use of certain *Johnson* factors to upgrade the lodestar, a contradiction which Respondents themselves recognize. (*Compare* Resp. Br. 21 ("[I]f the question presented is to be answered by reference to what the Congress that enacted Section 1988 intended, the [committee] reports supply the answer: upward enhancements are permitted."), *with* Resp. Br. 37 ("As this Court has made clear, there are numerous factors, such as contingency, that are not valid bases for enhancements.").) In *Blum*, this Court concluded that "[n]either complexity nor novelty of the issues [the second *Johnson* factor] . . . is an appropriate factor in determining whether to increase the basic fee award." 465 U.S. at 898-99. In *Delaware Valley I*, this Court stated that "it is unnecessary to enhance the fee for superior performance [the eighth *Johnson* factor] in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." 478 U.S. at 566. And, in *Dague*, this Court held that "enhancement for contingency [the sixth *Johnson* factor] is not permitted under the fee-shifting statute at issue."[5]

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[5] An enhancement for contingency was permitted in *Stanford Daily*, a case that Respondents believe establishes Congress' intent to approve enhancements such as that awarded

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505 U.S. at 567. Under Respondents' view, all of these decisions would be contrary to congressional intent underlying Section 1988 and should presumably be rejected. In reality, these decisions are consistent with Section 1988's intent to attract competent counsel without unduly enriching them.

Finally, Respondents contend that Congress' later prohibition of enhancements to fee awards under the Individuals with Disabilities Education Act ("IDEA") and the failure of proposed legislation attempting to prohibit enhancements are proof positive that Congress intended for quality and results enhancements to be applied to reasonable fee awards under Section 1988. (Resp. Br. 18, 45-46.) This argument is taken nearly verbatim from a portion of a dissent authored by Justice Blackmun in *Dague* which disagreed with the majority's holding that contingency could never justify enhancement of the lodestar. *See* 505 U.S. 557, 570 n.4 (Blackmun, J., dissenting).

The view of a later Congress in enacting a statute like IDEA cannot control the interpretation of a term in an earlier enacted statute. "[L]ater laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon

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by the District Court in this case (Resp. Br. 23-24), even though *Dague* later determined that an enhancement for contingency is prohibited under fee-shifting statutes such as Section 1988. 505 U.S. at 562, 567.

clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)). This Court has long held that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963)). Thus, prohibiting the use of a bonus or multiplier for IDEA fee awards provides no indication of congressional intent with respect to the definition of the term "reasonable attorney's fee" in Section 1988. In addition, the IDEA report cited by Respondents does not purport to refer to Congress' interpretation of the intent underlying Section 1988, but indicates only that it does not intend to overrule any decisions of this Court with respect to the availability of bonuses or multipliers under other statutes such as Section 1988. (Resp. Br. 18, 45; *see also* H.R. Conf. Rep. No. 99-687, at 6 (1986).) As previously stated, this Court has disapproved the use of certain factors to justify enhancing the lodestar.

With respect to the fact that some members of Congress may have introduced legislation subsequent to the enactment of Section 1988 to limit the use of enhancements or multipliers, this Court has held that "failed legislative proposals 'are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . .'" *United States v. Craft*, 535

U.S. 274, 287 (2002) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). This is because a bill can be proposed for any number of reasons or rejected for any number of others. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit*, 496 U.S. at 650). Therefore, with respect to what Congress may have intended when it enacted Section 1988, no meaning should be read into any failed effort by one or more members of Congress to later amend Section 1988 to bar enhancements.

II. Cases Awarding Enhancements Under the Common Fund Doctrine Are Inapplicable and Raise an Issue Decided Below and Not Before the Court.

Respondents' contention that the same standards that support enhancements to attorney's fee awards in commercial litigation should apply to this case suffers from a number of flaws. First, all but one of the twenty cases that Respondents cite in support of their position are common fund or common benefit awards inapplicable to cases like this one that involve the shifting of attorney's fees to government agencies. (Resp. Br. 26-31 (citing one non-common fund or non-common benefit case, *Wynn Oil Co. v. Purolator*

Chem. Corp., 391 F. Supp. 522 (M.D. Fla. 1974)).) *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 264 n.39 (1975) (contrasting the concept of a private attorney general from common fund and common benefit cases); *see also Brzonkala v. Morrison*, 272 F.3d 688, 692 (4th Cir. 2001); *Linquist v. Bowen*, 839 F.2d 1321, 1326 (8th Cir. 1988); *In re Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985); *Grace v. Burger*, 763 F.2d 457, 459 (D.C. Cir. 1985); *Jordan v. Heckler*, 744 F.2d 1397, 1400 (10th Cir. 1984); *Satoskar v. Indiana Real Estate Comm'n*, 517 F.2d 696, 697-98 (7th Cir. 1975). *See generally* Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 66-67 (Fed. Judicial Ctr. 2d ed. 2005) ("[C]ourts generally reject claims for a common fund recovery out of the government treasury; the award will come at the expense of all taxpayers, not solely the beneficiaries of the lawsuit.").

Second, Respondents' argument that the common fund and common benefit doctrines should apply to this case was specifically addressed and rejected by both the District Court and the Court of Appeals in holdings not now before the Court. (Pet. App. 106-11 ("conclud[ing] that neither the common fund doctrine nor the common benefit doctrine is applicable to this case"); Pet. App. 14 (holding that the "district court resolved [this] issue[ ] correctly").) There was no fund created by the parties' settlement in this case, the common fund doctrine's rationale does not apply to the fee-shifting that occurred, and this case is not

within the subset of cases for which common benefit recovery is allowed – suits by shareholders against their corporations and by union members against their unions. (*See* Pet. App. 108-09 (citing, *inter alia*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970)).)

Third, Respondents' position is not supported by this Court's precedent, and even they concede that "[a]s this Court has observed, the two contexts are not identical." (Resp. Br. 28-29.) In fact, this Court recognized this distinction before Section 1988 and has continued to recognize it both in common fund and fee-shifting cases. *See Blum*, 465 U.S. at 900 n.16; *Boeing*, 444 U.S. at 478 (stating that the *Alyeska* court "noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate"); *Alyeska*, 421 U.S. at 264 n.39. Most importantly, this Court has specifically explained that "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects *the amount of attorney time reasonably expended on the litigation.*" *Blum*, 465 U.S. at 900 n.16 (emphasis added); *cf. Delaware Valley I*, 478 U.S. at 562 n.6 (noting the inapplicability in a fee-shifting case of common fund recovery awarded in "commercial litigation").

Respondents attempt to circumvent this distinction and equate the two types of fee awards by stating

that, even in common fund, percentage-of-recovery cases, some courts conduct a lodestar "crosscheck," implying that enhancements for quality and results should therefore be allowed in fee-shifting cases. (Resp. Br. 29.) One of the cases cited by Respondents, however, contradicts this position by using the lodestar crosscheck for percentage-of-recovery awards not as the basis for an additional enhancement, but rather to determine whether the percentage award should be reduced. *See In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award.").

In their discussion of the lodestar in common fund cases, Respondents also argue that the Third Circuit's *Lindy I* decision supports their position that "upward adjustments for, *inter alia*, 'the quality of an attorney's work'" have been "historically permitted." (Resp. Br. 29-30 & n.4 (citing *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)).) Respondents' analysis, however, is suspect in light of later guidance from the Third Circuit, including a fee-shifting antitrust case which reversed and remanded an enhanced fee award with instructions that the district court consider quality of representation in setting the reasonable

hourly rate in the lodestar, rather than as an enhancement to the lodestar, as the district court initially had done. *See Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1216-17 (3d Cir. 1978) ("[C]onsiderations going to the quality of plaintiff's counsel should generally be made when setting the reasonable hourly rate, not at some point after the calculation of the lodestar.");[6] *see also Paschall v. Kansas City Star Co.*, 695 F.2d 322, 337 (8th Cir. 1982) (holding that "the district court abused its discretion in awarding any bonus for risk or quality of representation" in an antitrust fee-shifting case); *Cent. Telecomms., Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 910-11 (W.D. Mo. 1985) (disallowing enhancement for quality of representation or risk in antitrust fee-shifting case).

Respondents' attempt to use commercial litigation common fund cases as a barometer for how fee

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[6] Although *Baughman* stated that enhancements for quality of representation may be allowed in certain exceptional circumstances, a Third Circuit task force later recommended that such enhancements should never be permitted in fee-shifting cases. *See Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 264-65 (1985) ("[T]he quality factor should be eliminated from consideration. This factor is superfluous since it reflects the type of performance expected of all attorneys and theoretically already has been taken into account by the district court in setting standardized rates. Moreover, assessing the quality factor involves too subjective an inquiry and is thought to be subject to potentially discriminatory application, thereby potentially undermining the legal community's faith in the fee-setting process.").

awards should be considered in civil rights cases is not properly before this Court and has been rejected in previous decisions.[7] These awards are not the norm for most attorneys, much less necessary for clients to attract competent counsel in civil rights cases.

III. Adoption of Petitioners' Position Would Not Mandate a Reversal of *Blum*, But Adoption of Respondents' Arguments Would Seriously Undermine the Decisions in *Blum*, *Delaware Valley I*, and *Dague*.

Contrary to Respondents' pronouncement, there is no obligation to overrule *Blum* if this Court agrees with Petitioners that neither quality nor results can justify an enhancement to the lodestar. (Resp. Br. 45.) There are actually two holdings in *Blum*. The first, which is unrelated to the question presented in this case, is that "reasonable fees" under Section 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private counsel or a nonprofit legal services organization. 465 U.S. at 894-95. There is no dispute in this case that the

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[7] The declarations that Respondents provided to support a multiplier were based on the "'common fund/common benefit' approach," not fee-shifting statutes. (J.A. 66-67, 75, 80-81, 85-86, 90-91.) Moreover, as Judge Carnes explained, the declarants are not "disinterested," but rather are attorneys who themselves rely on court-awarded attorney's fees and, therefore, "have a financial interest" in encouraging the highest fee awards possible. (Pet. App. 44-45.)

District Court calculated the lodestar using prevailing market rates at the time of the entry of the Consent Decree. (Pet. App. 143 (stating that "the requested rates are consistent with prevailing market rates in Atlanta for comparable work").) The second is that the 50% upward adjustment of the lodestar by the district court in that case was unjustified and an abuse of discretion. 465 U.S. at 901. While the Court in *Blum* rejected the argument that an upward adjustment to the lodestar is never appropriate for any reason, the Court did not hold that either results obtained or quality of representation could provide an independent basis for enhancing a fee award. *See id.* Moreover, any such contention otherwise appears to have been laid to rest in *Delaware Valley I*, in which this Court stated as follows:

> *Blum* also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar, *we specifically held in Blum that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" are presumably fully reflected in the lodestar amount and cannot serve as independent bases for increasing the basic fee award.* Although upward adjustments are still permissible, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both

> "specific evidence" on the record and detailed findings by the lower courts.

478 U.S. at 564-65 (internal citations omitted; emphasis added). Although the Court indicated that it was not barring enhancements to the lodestar *in toto*, it also was clear that the two factors used to enhance the lodestar in this case are impermissible bases for enhancements.

This is not the kind of case referenced in *Blum* where an upward adjustment is needed because "the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is . . . unreasonably low." 465 U.S. at 897. The lodestar amount of $6.1 million for nearly 25,000 hours of time defeats that potential concern. Neither is this a case in which the "special skill" of any attorney "require[d] the expenditure of fewer hours than counsel normally would be expected to spend," because the almost 25,000 hours credited of the 30,000 hours claimed over the three-and-one-third year period of this case represented at least one timekeeper for Respondents working on the case every hour of every day of that period. *Id.* at 898; *see also Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983) ("In a case such as the one at bar, in which more than 9,000 hours were reported, we do not believe that any adjustment for extraordinary performance could be warranted.").

Once again, Petitioners are not advocating a "ban on enhancements," but only that results obtained and quality of representation cannot serve to justify an

increase in the lodestar amount because those factors, like complexity and novelty of the issues (*Blum*), superior performance (*Delaware Valley I*), and contingency (*Dague*) are subsumed within the lodestar. Respondents dismiss the authority of *Delaware Valley I* as a case which "simply reaffirmed *Blum*" and contend that Petitioners' reference to statements in *Delaware Valley I* that clearly negate the use of results obtained and quality of representation to increase the lodestar is "out of context" and "self contradictory." (Resp. Br. 47.)

In fact, as noted above, *Delaware Valley I* did not merely "reaffirm" *Blum*; it did much more. Indeed, this Court in *Delaware Valley I* stated that *Blum* "refined" *Hensley* by finding that the lodestar was "presumed" to be the reasonable fee to which counsel is entitled, and then went further to hold that there was a "strong presumption" that the lodestar figure constituted the "reasonable fee" to be awarded under Section 1988. 478 U.S. at 564-65. The Court then went on to discuss why "it is unnecessary to enhance the fee for superior performance," because Section 1988 was neither "designed as a form of economic relief to improve the financial lot of attorneys" nor "intended to replicate exactly the fee an attorney could earn though a private fee arrangement." *Id.* at 565. Finally, the Court recognized the obligation of an attorney "to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests," thereby negating

any need to enhance the lodestar for those factors. *Id.* at 565-66.

Respondents also try to minimize the effect of *Dague*, which rejected contingency as a factor for enhancing the lodestar, because it is a factor "different in kind" from results obtained and quality of representation in that it exists in every case. (Resp. Br. 50-51.) The prohibition of certain enhancements imposed by *Dague* (contingency), just as in *Blum* (novelty and complexity) and *Delaware Valley I* (superior performance), however, undermines Respondents' argument that Congress intended that enhancements be permitted for all of the *Johnson* factors. Of equal importance is that, in ruling out contingency as a factor which could increase the lodestar amount, *Dague* held that the relative merits of the claim "should play no part in the calculation of the award." 505 U.S. at 563. It would be inconsistent to hold, on the one hand, that the merits of a claim should not be reflected in the fee award and, on the other hand, that obtaining particular relief after the merits have been determined can result in a larger fee award.[8]

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[8] In this case, the District Court ordered an enhancement for "results obtained" because it was "unaware" of any case in which such a "favorable result" was bestowed upon a plaintiff class. (Pet. App. 154.) Pretermitting the number of the consent decrees with various states that Children's Rights contends to be "unprecedented" (Connecticut), "sweeping" (Michigan), "top-to-bottom reform" (Mississippi), and "system-wide reform" (Tennessee), *see* http://www.childrensrights.org/reform-campaigns/legal-cases (last visited Sept. 16, 2009), it is unfair to saddle one

(continued on following page)

IV. Respondents' Policy Arguments in Favor of Enhancements for Quality of Representation and Results Obtained Lack Merit and Ignore Reality.

Although Respondents critique Petitioners for somehow arguing policy instead of law (Resp. Br. 57-58), Respondents would have this Court declare the lodestar a passé concept based on "the word on the street" that law firms are moving away from the billable hour model.[9] (Resp. Br. 55-56.) It is absurd to suggest that this Court should somehow scrap the lodestar approach, "the guiding light of our fee-shifting jurisprudence," *Dague*, 505 U.S. at 562, based on some recent reports that the economic times are causing some lawyers to consider alternative billing methods more so than previously.

In fact, the real "word on the street" supports the view that enhancements are not necessary to attract competent counsel to represent plaintiffs in cases

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set of those defendants (the Governor of Georgia and the other Petitioners in this case) with paying an enhanced attorney's fee award – after consenting to a broad remedy – based only on the subjective view of a particular district court that the relief is "better" than in other cases.

[9] Other *amici* for Respondents also urge limitation of the lodestar method because of alternative billing arrangements now utilized by some firms and their clients. *See* Small Private Law Firms *Amicus Curiae* Br. Supp. Resp. 16; Law and Economics Scholars *Amicus Curiae* Br. Supp. Resp. 10; Lawyers' Committee for Civil Rights Under Law, *et al. Amicus Curiae* Br. Supp. Resp. 8; New York State Bar Ass'n, *et al. Amicus Curiae* Br. Supp. Resp. 23.

involving fee-shifting statutes such as Section 1988. For one thing, law firms over the past year have been laying off attorneys, so neither firms nor lawyers are likely to turn down an opportunity to represent a client in a matter in which a successful lawyer can obtain a statutory fee based on time expended multiplied by regular hourly rates. *See* Jesse J. Holland, *Recession Causing Lawyer Layoffs at Big Firms*, Associated Press, Apr. 13, 2009, *available at* http://www.breitbart.com/article.php?id=D97HO0E80&show_article=1 (last visited Sept. 16, 2009). Indeed, given the lean economic times, the number of attorneys donating time for pro bono causes has increased. *See* Daphne Eviatar, *Pro Bono Hours Go Up in Down Economy*, The American Lawyer, Jan. 2, 2009, *available at* http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202427138674 (last visited Sept. 16, 2009); Martin C. Daks, *Down Economy Spurs Pro Bono Work, Law Group Says*, NJBiz, July 29, 2009, *available at* http://www.njbiz.com/article.asp?aID=78763 (last visited Sept. 16, 2009).[10]

Respondents' lead counsel, Children's Rights, has never hesitated in filing civil rights cases challenging

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[10] Notwithstanding the District Court's awarding more than $10 million in attorney's fees in this case, Respondents' lead local counsel's representation in this case has been characterized as "pro bono work." Linton Johnson, *New President is a Georgia Lawyer by Choice*, 14 Ga. Bar. J. 44, 46 (Aug. 2008), *available at* http://www.gabar.org/public/pdf/GBJ/aug08.pdf (last visited Sept. 16, 2009).

the legality of states' child welfare programs nor had difficulty in obtaining local counsel to assist them in prosecuting those cases without the promise of an enhanced fee award for superior work or results. Indeed, Respondents admit that this is "the first such request [for an upward adjustment to the lodestar] that counsel for Children's Rights had ever made, despite their involvement in numerous similar suits." (Resp. Br. 9.) *See also Marisol A. v. Giuliani*, 111 F. Supp. 2d 381 (S.D.N.Y. 2000) ($8 million attorney's fee request by Children's Rights, including no request for enhancement, reduced by district court to $5.8 million for excessive billing); *LaShawn A. v. Barry*, No. 89-1754 (TFH), 1998 U.S. Dist. LEXIS 2137 (D.D.C. Feb. 18, 1998) (application of current rates is fair compensation for the wait that plaintiffs and their counsel have endured).[11] Other courts' lodestar awards without any multipliers for quality or results have provided Children's Rights' clients with more than the "competent counsel" intended by the enactment of Section 1988.

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[11] Amicus Civil Rights Clinic at Howard University School of Law trumpets both *LaShawn A.* and *Marisol A.* as cases that provided system-wide relief and "exemplify the skill, diligence, and perseverance required by plaintiffs' counsel bringing successful child welfare reform cases. . . ." Civ. Rights Clinic at Howard Univ. Sch. of Law *Amicus Curiae* Br. Supp. Resp. 3, 24. It is noteworthy that in neither case did plaintiffs' counsel seek or receive an enhancement for results obtained or quality of representation. (*See* Resp. Br. 9.)

Respondents also decry the lodestar method as ignoring "the reality of a lawyer's practice as one of creativity and imagination" and failing to take into account that hourly rates times hours worked do not reward "brilliant insights and timely maneuvers." (Resp. Br. 54-55.) Based on this nebulous standard, district courts presumably would have to determine whether an otherwise experienced and well-respected attorney deserved more than his or her already top-of-the-market hourly rate because of some "brilliant insight," or a younger lawyer with a lower hourly rate should be compensated more based on a "timely maneuver."

The problem with multipliers for these reasons, like contingency, "is that there are no standards and the trial judge is cast adrift in a sea of judicial discretion. If the truth be known, the process of arriving at the precise multiplier is more a function of gestalt than cerebration." *Black Gold, Ltd. v. Rockwool Indus.*, 529 F. Supp. 272, 279 (D. Colo. 1981). Furthermore, this "genius factor" actually "diminishes and eventually disappears as the number of hours expended on the case increases. A brilliant idea may shortcut one aspect of the case and save many hours, but in protracted litigation a lawyer is also likely to pursue blind alleys and expend many unproductive hours." *Ramos*, 713 F.2d at 557. In this case, 38 timekeepers were compensated for nearly 25,000 hours of work over slightly more than a three-year period. There is no precedent for awarding an additional $4.5 million on top of a prevailing market

rate because that rate somehow fails to compensate brilliance.

> There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of *fewer* hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.

Blum, 465 U.S. at 898 (emphasis added). If the reasonable hourly rate adequately accounts for the situation where the brilliance of counsel results in *fewer* hours expended on a case, then surely the expenditure of *larger* numbers of hours provides an even greater reason to deny an enhancement to the lodestar. Moreover, "the greater the number of attorneys involved on a side, the less likely it is that an extraordinary performance bonus is appropriate." *Ramos*, 713 F.2d at 557.

Respondents also contend that fee agreements entered into "between highly sophisticated clients and counsel" do not always call for compensation to be paid based on hourly rates, citing to a single "sample engagement agreement" offered by Minnesota Lawyers Mutual Insurance Company. (Resp. Br. 55, 56 (citing "Sample Engagement Agreement," *available at* http://www.mlmins.com/Documents/SiteContent/f18ec30b-7e26-4c75-b887-7ece040256aa.pdf (last visited Sept. 16, 2009)). Interestingly, page 2 of that sample agreement provides that the client

agrees to pay its attorneys based on a range of hourly rates, depending upon the position and tenure of the attorney in his or her firm. A subsequent paragraph on page 3 of the sample agreement states that while fees are primarily based upon time spent, they can also reflect other factors such as the result obtained and ability of the attorneys retained. That statement is clearly intended to explain why some of the quoted hourly rates may be higher than others. Lawyers who attempt to tack on an additional "success" or "quality" bonus to an agreement to bill clients based on hourly rates are likely to end up with an unpaid bill in addition to a client who takes its business elsewhere. Regardless, fee-shifting statutes such as Section 1988 were not "intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Delaware Valley I*, 478 U.S. at 565. As long as such an attorney is paid a fee that is reasonable, "the purpose behind the fee-shifting statute has been satisfied." *Id.*

Respondents, as well as several of their *amici*,[12] complain that Petitioners are themselves to blame for

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[12] *See* Small Private Law Firms *Amicus Curiae* Br. Supp. Resp. 25; Liberty Legal Inst., *et al. Amicus Curiae* Br. Supp. Resp. 17-20; Amer. Ass'n for Justice, *et al. Amicus Curiae* Br. Supp. Resp. 8.

the District Court's enhancement to the lodestar because Petitioners had the temerity to raise certain available defenses to Respondents' claims rather than capitulating at the outset or agreeing to Respondents' demands at an earlier phase of the litigation.[13] Based on this view, an enhancement for quality and results can be tied directly to the intransigence of opposing counsel. However, any additional effort required by Respondents to respond to Petitioners' defenses is

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[13] Contrary to this position, Respondents admit that Petitioners' motion to dismiss was based on existing Eleventh Circuit precedent. (*See* Resp. Br. 3 (citing *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003)).) Moreover, the basis for Petitioners' motion for summary judgment was that the deliberate indifference standard should be applied pursuant to other existing Eleventh Circuit precedent, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*). It was not stubbornly litigious for Petitioners to argue that a particular legal standard applied based on existing precedent. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) ("A fair adversary process presupposes both a vigorous prosecution and a vigorous defense.").

In addition, the "technical legal objections to discovery requests" made by Petitioners at the District Court (*see* Resp. Br. 4) were that Respondents continued to serve Petitioners with discovery requests after the discovery period had ended. (Order Extending Discovery Period [Dkt. 145].) After this objection was made, the District Court *sua sponte* granted Respondents extra time to engage in discovery. (Order Extending Discovery [Dkt. 145] ("Defendants are correct that, under the Court's local rules, the discovery period in this case expired on December 7, 2002. Nevertheless, in the interests of justice and notwithstanding plaintiffs' failure to seek a timely extension of the discovery period, the Court concludes that discovery should be extended for an additional four months.") (citation and footnote omitted).)

reflected in the lodestar in the number of additional hours expended, and enhanced recovery should not be allowed. *See Dague*, 505 U.S. at 562-63 ("[T]he higher number of hours expended to overcome the difficulty [of establishing the merits]" is "ordinarily reflected in the lodestar."). Surely, the award of nearly 25,000 hours over the three-year litigation period compensates Respondents reasonably for any additional efforts necessary to address Petitioners' defenses. "Taking account of it again through lodestar enhancement amounts to double counting." *Id.* at 563.

Finally, Respondents bemoan the fact that a prohibition of enhancements for quality of representation and results obtained will leave an attorney with only the hope of recovering for the time expended using his or her standard hourly rate, which may then be reduced by a district court "based on the numerous bases for reducing an award or denying recovery altogether." (Resp. Br. 58.) The fact that an attorney cannot recover for claims other than those the attorney prevails upon is mandated by Section 1988 itself. In addition, the unavailability of contingency-based enhancements and expert fee reimbursements under Section 1988 (Resp. Br. 36-37) does not justify a performance-based enhancement in order for prevailing parties to obtain through the back door what the law prohibits them from receiving through the front door. Finally, the fact that the district court may reduce the hours claimed as

excessive is not a reason to reward those lawyers with a bonus for a job well done.[14]

Respondents represented their clients well in accordance with the standards required of our profession. The lodestar award of $6,012,802.90[15] constitutes a reasonable fee awarded to a prevailing party in accordance with Section 1988. There is no legal or practical reason to enhance that lodestar amount for the quality of Respondents' counsel's representation or the results obtained.

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[14] Contrary to Respondents' objection (Resp. Br. 38 n.5), it is relevant that the District Court in this case applied a 15% across-the-board reduction for non-travel hours claimed due to excessive billing and vague entries (Pet. App. 145-46). This Court in *Delaware Valley I* found that an "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive *is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'*" 478 U.S. at 566-67 (emphasis added).

[15] The $6 million fee award is consistent with prevailing market rates in Atlanta at the time of the entry of the Consent Decree, and Respondents also will collect over a 4% interest rate on that amount dating from October 2005, a significantly higher interest rate than that money would have earned in recent years. *See* 28 U.S.C. § 1961; Pet. App. 169-70 (denying Respondents' motion for an interim fee award during appeal and noting that Respondents "will be compensated for any delay in payment occasioned by the appeal, because interest will run on the full amount of the fee and expense award from October 27, 2005, the date of entry of the Consent Decree").

CONCLUSION

For the reasons set forth above and those set forth in Petitioners' initial Brief on the Merits, the decision of the United States Court of Appeals for the Eleventh Circuit affirming the award of a $4.5 million enhancement to the lodestar should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

B769

No. 08-970

In the Supreme Court of the United States

SONNY PERDUE, GOVERNOR OF THE STATE OF GEORGIA, ET AL., PETITIONERS

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The petition for a writ of certiorari was granted limited to the following question: "Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?"

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether a court, in determining an award for reasonable attorney's fees under a federal fee-shifting statute, may enhance the award above the lodestar amount based on the quality of representation and results obtained. The United States has a substantial interest in the resolution of this issue. The availability of adequate attorney's fees is important to ensure the pursuit of meritorious private actions that complement the government's own enforcement efforts. At the same time, the United States itself may be liable for attorney's fees under more than 100 statutes that allow prevailing parties to recover reasonable attorney's fees. The interpretation of a "reasonable" attorney's fee in 42

U.S.C. 1988(b), at issue in this case, is likely to govern the interpretation of those numerous other fee-shifting provisions. See, *e.g.*, *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

STATEMENT

1. In June 2002, respondents filed this class action against petitioners, the Governor of Georgia and various other state officials, on behalf of 3,000 children in foster care. The complaint alleged that petitioners violated federal and state constitutional and statutory provisions in their administration of the foster care system in two metropolitan Atlanta counties. Several of the federal law claims were brought under 42 U.S.C. 1983. The suit sought declaratory and injunctive relief, along with attorney's fees and expenses. Pet. App. 3a-5a. After discovery, denial of petitioners' motion for summary judgment, and four months of mediation, the parties entered into a consent decree—approved by the district court in October 2005—that resolved all pending issues, except the amount of attorney's fees owed respondents as the "prevailing party" under 42 U.S.C. 1988(b). *Id.* at 6a-8a.

Respondents thereafter filed an application requesting nearly $15 million ($14,342,860 to be exact) in attorney's fees for nearly 30,000 hours claimed to have been worked by their legal team. Pet. App. 104a-105a. Half of the amount requested ($7,171,430) represented the proposed "lodestar" amount, which is "the product of reasonable hours times a reasonable rate." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*). That figure included payment for work by respondents' attorneys at hourly rates ranging from $215 to $495, and by paralegals and interns at hourly rates ranging from $75

to $150. Pet. App. 105a. Those rates, according to the attorney affidavits submitted by respondents themselves, were "fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). According to one of the lead trial counsel for respondents, a partner at a prestigious Atlanta litigation boutique, the rates requested "correctly reflect the hourly rates my law firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis." J.A. 47 (Bramlett Dec.).

The other half of the amount requested (an additional $7,171,430) was sought as an enhancement of the fee award based on several grounds. See Resp. Dist. Ct. Br. in Support of Award of Atty's Fees & Expenses of Litig. 1-36. Respondents relied, in part, on the quality of representation provided by their counsel and the successful results that they achieved. *Id.* at 2-3, 29-31. In addition, respondents relied on the contention that the lodestar did not account for contingency risk in the case or delayed payment of attorney's fees and expenses. *Id.* at 3-9, 31-34. According to respondents, this latter set of factors meant that the proposed hourly rates were lower than true market rates for the services provided. J.A. 41 (Lowry Dec.), 57 (Bramlett Dec.).

Petitioners objected to the amount of fees requested. Petitioners argued that the number of hours claimed and some of the hourly rates proposed were excessive. Pet. App. 9a. They also argued that an enhancement for the quality of representation and the results obtained was not appropriate because those factors were already

taken into consideration in setting the lodestar amount. *Ibid.*

The district court partially sustained petitioners' objections to the number of hours claimed. It made a 15% across-the-board reduction to non-travel hours, which resulted in a monetary reduction of the lodestar to $6,012,803. Pet. App. 145a. The court based the reduction on "(1) the vague and noncompensable entries in counsel's billing records; (2) the excessive number of hours spent on pre-suit investigation and drafting the complaint and mandatory disclosures; (3) overstaffing at the preliminary injunction hearing; (4) the excessive number of hours spent on document production and analysis; (5) the excessive number of hours spent responding to a motion to compel and overstaffing of discovery and status conferences; (6) the excessive number of hours spent in intra- and inter-officer [sic] conferences and correspondence; (7) noncompensable time spent on expert witnesses and reports; (8) the excessive number of hours spent responding to the motion for summary judgment; and (9) the excessive number of hours spent on trial preparation." *Ibid.* (internal citations omitted).

The district court, however, rejected petitioners' objections to the hourly rates. It found that, in light of "the stellar performance of plaintiffs' counsel throughout this long and difficult case," the requested hourly rates—including a rate "near the high end of the Atlanta market" for one of the lead trial counsel—all were "fair and reasonable." Pet. App. 143a-144a.

The district court also rejected petitioners' objections to the requested fee enhancement. The court relied first on evidence of respondents' counsel's "extraordinary commitment of capital resources" to the case,

without any guarantee of fees or reimbursement. Pet. App. 151a. In particular, the court found:

> the evidence shows that the hourly rates used in the lodestar calculation do not take into account (1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an ongoing basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.

Ibid.

The district court also found, based on its "personal observation of plaintiffs' counsel's performance throughout this litigation," that "the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." Pet. App. 151a; see *id.* at 151a-152a ("Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."). Finally, the court stated that "the evidence establishes that plaintiffs' success in this case was truly exceptional." *Id.* at 152a.

For those reasons, the district court increased the $6,012,803 attorney's fee award by a multiplier of 1.75, resulting in an additional $4,509,602, which boosted the total fee award to $10,522,405. Pet. App. 154a-155a.

2. Both petitioners and respondents appealed.[1] The court of appeals affirmed the district court's fee award in a unanimous judgment with three separate opinions. Pet. App. 1a-93a.

Judge Carnes concluded that the panel was bound by prior circuit precedent holding that superior quality of representation coupled with superior results is a permissible basis for an enhancement of the lodestar amount. Pet. App. 57a-63a (citing *NAACP* v. *City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman* v. *Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988)). In Judge Carnes' view, however, *NAACP* and *Norman* appeared to conflict with this Court's precedent establishing a strong presumption that the lodestar reflects a reasonable attorney's fee. *Id.* at 61a-69a. Judge Carnes further reasoned that such enhancements constitute double counting and are unnecessary to further the statutory purpose of attracting capable counsel. *Id.* at 38a-57a.

Judge Wilson concluded that *NAACP* and *Norman* were not inconsistent with this Court's teachings, and found that record evidence of superior performance supported the district court's finding that the lodestar was insufficient to provide a reasonable attorney's fee in this case. Pet. App. 71a-93a. Judge Hill observed only that "[t]he enhancement by the district court is due to be

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[1] Respondents argued in their cross-appeal that the district court abused its discretion by not applying the "common fund" and "common benefit" doctrines to enhance the fee award. They also challenged the district court's ruling denying them $801,864 in expert witness expenses. The court of appeals affirmed the district court's rulings on those claims for the reasons explained in the district court's opinion. Pet. App. 14a; see *id.* at 106a-111a, 157a-159a. Respondents have not sought further review of the appeals court's decision on those issues.

affirmed because we are bound by the prior cases of our court." *Id.* at 93a.

In the separate opinions, the court of appeals also addressed the other set of factors—*i.e.*, contingency risk, delayed payment of attorney's fees, and counsel's advancement of expenses—on which the district court based the fee enhancement. The panel rejected the district court's reliance on the contingency-fee arrangement. Judge Carnes explained that "[e]nhancing a lodestar based on contingency is flatly forbidden by the [*City of Burlington* v. *Dague*, 505 U.S. 557 (1992)] decision." Pet. App. 35a. Judge Wilson agreed. *Id.* at 85a. Judge Carnes and Judge Wilson, however, disagreed as to whether the delayed payment of fees and expenses was a permissible basis for an enhancement. See *id.* at 33a-35a, 85a. Judge Hill expressed no position on those issues. See *id.* at 93a.

Notwithstanding its conclusion that the district court improperly relied on the contingency risk and its internal division on whether the district court properly relied on the delayed payment of fees and expenses, the court of appeals affirmed the full amount of the district court's award. Pet. App. 70a-71a. Judge Carnes explained that "our reading of the district court's opinion leaves us convinced that it would be pointless to remand to that court with instructions that it reconsider whether to give an enhancement, or the amount of one, free of those improper considerations. * * * So long as our *NAACP* and *Norman* decisions stand, the district court can, and would again on remand, reach the same result that we have before us and rest it on the basis of quality of representation and superior results." *Id.* at 70a.

3. The court of appeals denied rehearing en banc. Pet. App. 173a-216a.

In an opinion concurring in the denial of rehearing (Pet. App. 174a-180a), Judge Wilson reiterated the views stated in his panel opinion—*i.e.*, that "the Supreme Court has consistently indicated that, in the 'rare' and 'exceptional' case, the district court has the discretion to grant an enhancement." *Id.* at 177a. In a dissenting opinion (*id.* at 180a-202a), Judge Tjoflat concluded that an enhancement based on "exceptional" or "superior" results can never be appropriate in a class action seeking injunctive relief, especially where "a lodestar already reflect[s] an hourly rate prevailing at the top of the relevant market." *Id.* at 193a, 200a. Judge Carnes, in a separate dissenting opinion joined by Judges Tjoflat and Dubina (*id.* at 202a-216a), reiterated his views and noted that none of the Supreme Court precedents cited by Judge Wilson had upheld a fee enhancement based on the quality of representation or the results obtained.

SUMMARY OF ARGUMENT

Federal fee-shifting statutes do not authorize enhancement above the lodestar amount based on the quality of representation or the results obtained for a simple reason—because both factors are already incorporated into the lodestar calculation. The rule adopted by the Eleventh Circuit would result in impermissible double counting. Accordingly, the district court's award of a 75% performance bonus—a $4.5 million increase over the $6 million lodestar amount—should be reversed.

A. This Court has instructed that most factors relevant to the determination of a reasonable attorney's fee, including the quality of representation and the results obtained, are presumed to be reflected in the calculation

of the lodestar and therefore cannot serve as independent bases for enhancing the fee award beyond the lodestar amount. See *City of Burlington* v. *Dague*, 505 U.S. 557, 562-563 (1992); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-565 (1986). Notwithstanding dicta in some cases that enhancements based on the quality of representation and results obtained "may" be justified in "rare" and "exceptional" cases, this Court has *never* upheld a fee enhancement based on those criteria.

B. This Court should hold that the lodestar presumption is conclusive with respect to the quality of representation and results obtained because any enhancement on those grounds would amount to double counting. The reasonable hourly rates for the particular attorneys handling a case already reflect their experience, qualifications, and abilities. Rates set near the top of the prevailing market contemplate high quality representation and optimal results, and so those factors warrant no further enhancement in a case like this one. Respondents' counsel themselves acknowledge that their proposed rates were "reasonable" in light of rates charged by counsel "of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). That other factors (contingency risk and delayed payment) may have placed them in a different position than attorneys in the private market is beside the point: those are not permissible grounds for enhancement and, in any event, are beyond the scope of the question presented.

C. Enhancements based on the quality of representation or the results obtained are not necessary to satisfy the aim of fee-shifting statutes. Congress de-

signed these statutes to enable private parties to attract competent counsel to help vindicate important federal rights, but Congress also cautioned that attorney's fee awards should not produce windfalls. Discretionary, performance-based enhancements of lodestar fee awards that already reflect market rates—especially where, as here, the rates used are near the top of the prevailing market—are unnecessary to attract counsel and result in such a windfall. In the rare case in which representation of an unpopular or otherwise highly controversial client causes counsel to suffer professional or financial harm, the lodestar amount may be insufficient and an enhancement appropriate. But no such special circumstances are present in this case, and the lodestar is the reasonable measure of compensation.

ARGUMENT

FEE-SHIFTING STATUTES THAT PERMIT AN AWARD OF "REASONABLE" ATTORNEY'S FEES DO NOT AUTHORIZE ENHANCEMENT ABOVE THE LODESTAR AMOUNT BASED ON QUALITY OF REPRESENTATION OR RESULTS OBTAINED BECAUSE BOTH FACTORS ARE ACCOUNTED FOR IN DETERMINING THE LODESTAR

Under the "American Rule," a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"—at least "without legislative guidance." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975); see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (American Rule governs "absent explicit statutory authority."). Congress has provided that guidance through numerous federal statutes authorizing an award of a reasonable attorney's fee to a prevailing party to encourage private citizens to vindicate

important public rights.[2] *E.g.*, 42 U.S.C. 1988(b) ("In any action or proceeding to enforce [enumerated civil rights laws], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."); see *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986) ("There are over 100 separate statutes providing for the award of attorney's fees."). Regardless of the underlying claim or context, "the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" *Ibid.* Like other fee-shifting statutes, however, Section 1988(b) is silent on what constitutes a "reasonable" attorney's fee.

As this Court's precedents indicate, the lodestar—the product of the reasonable hourly rate and the number of hours reasonably expended—is presumed to rep-

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[2] The statutes include, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b); Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); Clean Air Act, 42 U.S.C. 7413(b), 7604(d), 7607(f), 7622(b)(2)(B); Consumer Product Safety Act, 15 U.S.C. 2060(c) and (f), 2072(a), 2073; Truth in Lending Act, 15 U.S.C. 1640(a)(3); Clayton Act, 15 U.S.C. 15; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(a); Copyright Act, 17 U.S.C. 505; Trademark Act of 1946, 15 U.S.C. 1117; Endangered Species Act of 1973, 16 U.S.C. 1540; National Historic Preservation Act, 16 U.S.C. 470w; Toxic Substances Control Act, 15 U.S.C. 2618(d), 2619(c); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(e); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1734; Clean Water Act, 33 U.S.C. 1365(d); Act to Prevent Pollution from Ships, 33 U.S.C. 1910(d); Safe Drinking Water Act, 42 U.S.C. 300j-8(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415; Energy Policy and Conservation Act, 42 U.S.C. 6305(d); and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(a). See Pet. App. 217a-223a (listing over 80 statutes).

resent a reasonable attorney's fee. Because the quality of representation and results obtained are both reflected in the lodestar calculation, no enhancement based on those factors is necessary to make a lodestar award reasonable or to fulfill the statutory purpose of attracting competent counsel. The facts of this case, in which the district court accepted respondents' proffered high-end market rates for counsel of high-end quality and accordingly awarded a lodestar of over $6 million, well illustrate the redundancy of any enhancement of attorney's fees based on the quality and success of representation.

A. This Court Has Established A Strong Presumption That The Lodestar Calculation Yields A Reasonable Attorney's Fee And Has Never Upheld An Enhancement Based On Attorney Performance

Over the past quarter century, this Court has articulated the standards for determining the amount of a reasonable attorney's fee award under Section 1988(b)—with an ever-increasing emphasis on the lodestar calculation as providing the correct amount, exclusive of any additional quality or results-related enhancements.

In 1983, the Court addressed "whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley* v. *Eckerhart*, 461 U.S. 424, 426 (1983). The Court in *Hensley* identified the "lodestar," *i.e.*, the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," as the "most useful starting point" for determining a reasonable attorney's fee award. *Id.* at 433. The Court commented that the lodestar could be adjusted upward or downward on the basis of other considerations, including the "results obtained" and other factors set forth in *Johnson* v. *Georgia Highway Ex-*

press, Inc., 488 F.2d 714 (5th Cir. 1974), but cautioned district courts to keep in mind that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."[3] *Hensley*, 461 U.S. at 434 n.9; see *id.* at 435 ("in some cases of exceptional success an enhanced award may be justified"). *Hensley* itself presented only the question of when a *downward* departure was appropriate based on limited success, not the converse. *Id.* at 436-440.

The next year, in *Blum* v. *Stenson*, 465 U.S. 886 (1984), the Court attached even more significance to the lodestar calculation and limited the factors that a district court could consider in determining whether to enhance the lodestar amount. In *Blum*, the district court had awarded a 50% enhancement to the lodestar, based on "the complexity of the litigation, the novelty of the issues, the high quality of representation, the 'great benefit' to the class, and the 'riskiness' of the lawsuit." *Id.* at 898. This Court held that "[t]he reasons offered by

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[3] The legislative history to Section 1988(b) identifies *Johnson* as listing the "appropriate standards" to be considered in determining a reasonable attorney's fee award. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). The *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-719.

the District Court to support the upward adjustment do not withstand examination." *Ibid.* The Court explained:

> The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel. * * * There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

Id. at 898-899.

The Court also explained that the quality of representation "generally is reflected in the reasonable hourly rate," and that "[i]t, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Blum*, 465 U.S. at 899 (citing *Hensley*, 461 U.S. at 435). The Court elaborated that "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award"—even when the results obtained benefit a large class of people. *Id.* at 900 & n.16. Applying those principles to the record before it, the Court concluded that no enhancement above the lodestar amount

was necessary to provide reasonable compensation. *Id.* at 900-902.

Two years later, in *Delaware Valley I*, *supra*, the Court further restricted whatever room remained to enhance an attorney's fee award above the lodestar amount based on quality and results of representation. In characterizing its holding in *Blum*, the Court explained:

> *Blum* also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar, we specifically held in *Blum* that the * * * "quality of representation" and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Delaware Valley I, 478 U.S. at 564-565 (citing *Blum*, 465 U.S. at 898-900).

Although acknowledging the possibility of an enhancement in "rare" and "exceptional" cases, the Court in *Delaware Valley I* emphasized that "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute." 478 U.S. at 565. The Court reasoned that federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client."

Ibid. The Court explained that if a plaintiff is able to retain counsel "based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Ibid.*

Applying those principles, the Court again rejected a district court's enhancement of a fee award for exceptional quality of representation and results obtained. *Delaware Valley I*, 478 U.S. at 566-568. The Court noted that the district court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive "is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Id.* at 567.

In its last case concerning fee enhancements, *City of Burlington* v. *Dague*, 505 U.S. 557 (1992), the Court addressed the question, left open in *Delaware Valley I*,[4] whether a contingency-fee arrangement may serve as a basis for enhancement of an attorney's fee award because the attorneys "assumed the risk of receiving no payment at all for their services." *Id.* at 559. The Court "note[d] at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.* at 562. The Court explained that the difficulty of establishing the merits of a claim "is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."

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[4] The Court in *Delaware Valley I* ordered reargument on the question whether an attorney's fee award may be enhanced based on the risk of loss. 478 U.S. at 568. That question was addressed in an ensuing decision, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), but the Court did not garner a majority to resolve the issue conclusively.

Ibid. Taking account of this factor again through lodestar enhancement amounts to "double counting." *Id.* at 563.

The Court in *Dague* further explained that it was impermissible to increase the award based on risk of loss because the fee-shifting statute was designed to compensate a "prevailing plaintiff" for successful claims, not to subsidize the litigation of unsuccessful ones. 505 U.S. at 565. Because a contingency-based enhancement is not "necessary to the determination of a reasonable fee," the Court concluded that such an enhancement "is not permitted under the fee-shifting statutes." *Id.* at 566-567.

In sum, this Court has steadily distanced itself from the notion that an enhancement above the lodestar amount may be based on quality of representation or results obtained, even in "exceptional" cases. The Court's analysis in *Delaware Valley I* and *Dague* in particular focused on the way the lodestar calculation already incorporates considerations that lower courts had mistakenly viewed as justifying a premium. And this Court has *never* upheld an enhancement to an attorney's fee award based on these criteria. Accordingly, any suggestion that such enhancements are possible has always been dicta. In its actual holdings, the Court has perceived enhancements for quality and results as superfluous in light of the basic lodestar calculation.

B. No Enhancement To The Lodestar Is Justified Based On The "Quality Of Representation" Or The "Results Obtained" Because Both Factors Are Already Reflected In The Lodestar Calculation

As demonstrated above, the lodestar figure has "become the guiding light" of this Court's "fee-shifting ju-

risprudence." *Dague*, 505 U.S. at 562. The lodestar "is more than a mere 'rough guess' or initial approximation of the final award to [be] made." *Delaware Valley I*, 478 U.S. at 564. Instead, when "'the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled," and "the 'quality of representation,' and the 'results obtained' * * * thus cannot serve as independent bases for increasing the basic fee award." *Ibid.* (quoting *Blum*, 465 U.S. at 897). Fee awards must be "reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, *by definition* will represent the reasonable worth of the services rendered in vindication of a plaintiff's * * * claim." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989) (emphasis added).

This Court should hold what the logic of its precedents dictate and make conclusive the presumption that the lodestar (assuming its components are properly set) represents a reasonable attorney's fee, such that enhancements based on quality of representation or results obtained are not permissible. See *Dague*, 505 U.S. at 559-567 (stating that contingency cannot alter the presumption that the lodestar constitutes a reasonable fee). The correctness of that conclusion is most evident where, as here, the accepted hourly rates are already near the top of the market.[5]

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[5] As discussed below (pp. 30-31, *infra*), the government's position would not preclude an enhancement on the distinct ground that an attorney's representation of an unpopular or highly controversial client causes the attorney to suffer some ancillary harm that renders the lode-

1. An enhancement based on attorney performance would result in double counting

The quality of representation and results obtained are accounted for in the lodestar calculation. The reasonable hourly rates for the particular attorneys handling a case will reflect their experience, qualifications, and abilities. See *Blum*, 465 U.S. at 895-896 n.11 (defining "prevailing market rate" as the rate "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation"); Model Rules of Prof'l Conduct Rule 1.5(a)(7) (2007) (Model Rule) ("The factors to be considered in determining the reasonableness of a fee include * * * the experience, reputation, and ability of the lawyer or lawyers performing the services."). Rates at or near the top of the prevailing market contemplate that an attorney will provide high quality representation and produce optimal results. See *Pierce* v. *Underwood*, 487 U.S. 552, 573 (1988) ("the 'work and ability of counsel,' and 'the results obtained' * * * are little more than routine reasons why market rates are what they are") (citation omitted); *Delaware Valley I*, 478 U.S. at 565 ("when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results"). A bonus on top of those rates for quality of representation or results obtained, therefore, would be "double counting." *Id.* at 566.

The risk of double counting in fee-shifting cases is particularly great because the hourly rates are determined *after* the requesting party has prevailed. A dis-

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lodestar amount insufficient to provide adequate compensation or incentive to take on the representation.

trict court thus has the opportunity, when setting the reasonable hourly rate, to take into account not only the attorney's prior experience and qualifications, but also his performance in the very case at hand. That process allows even inexperienced or unheralded attorneys—whose hourly rates might otherwise be at the low end of the prevailing market—to obtain an hourly rate nearer to the high end of the market. By this means, the lodestar itself reflects exceptional skill or ability not only in the attorney's prior work, but in his handling of the case at issue. The circumstance articulated by the Court in *Blum* as possibly justifying an enhancement—where "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged," 465 U.S. at 899—therefore simply does not arise when the lodestar rate has been properly determined.

Even if that hypothetical circumstance arose, it would not be a proper basis for an enhancement. To the extent a prevailing party's attorney commanded a relatively low market rate, that attorney by definition would not have received higher compensation had he spent his time litigating another case instead. And the attorney's success in that hypothetical case would justify an increase in his market rate for future cases—an important economic benefit itself. In any event, as discussed below (pp. 23-25, *infra*), the dicta from *Blum* is not relevant to this case: respondents' lead trial counsel were highly experienced and accomplished attorneys whose prevailing market rates already reflected those characteristics and the accompanying high expectations of their performance.

Similarly, to the extent a prevailing party's counsel persevered through particularly difficult litigation, the

greater number of hours deemed reasonable for purposes of the lodestar calculation will reflect those circumstances. See *Dague*, 505 U.S. at 562 (difficulty of establishing the merits of a claim "is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so"); *Blum*, 465 U.S. at 898 ("The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel," and, to the extent "the experience and special skill of the attorney will require the expenditure of fewer hours," that "should be reflected in the reasonableness of the hourly rates."). Lodestar enhancement for success in the face of challenging obstacles thus also amounts to "double counting." *Dague*, 505 U.S. at 563.

Enhancements for improbable success also implicate the Court's concern (expressed in the context of considering the relevance of contingency risk to fees) about "encouraging nonmeritorious claims." *Dague*, 505 U.S. at 563. An attorney might be more likely to bring a marginal claim than he otherwise would—"an unlikely objective of the 'reasonable fees' provisions," *ibid.*—if he harbored the hope of an enhancement for "exceptional" success in the event he prevailed. And as the Court previously has recognized, the size of the class benefitting from success should not justify an enhancement either. See *Blum*, 465 U.S. at 900 n.16 ("Nor do we believe that the *number* of persons benefited is a consideration of significance in calculating fees under § 1988. * * * Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.").

As compared with the method of simply setting the lodestar correctly, enhancements based on quality of representation or results obtained also lack clear, objective standards. The lodestar methodology was developed in part to provide greater regularity in the determination of a reasonable attorney's fee than could be achieved under the 12-factor analysis suggested by the Fifth Circuit's 1974 decision in *Johnson* (see note 3, *supra*). See *Delaware Valley I*, 478 U.S. at 562-563. This Court has explained that *Johnson*'s "major fault was that it gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Id.* at 563. The *Johnson* factors at issue in this case are no less subjective or acceptable when they are used to enhance, rather than to set in the first instance, the lodestar award. Indeed, the Court's development of the lodestar methodology to enhance clarity and objectivity in determining attorney's fees would be seriously compromised if lower courts felt free to superimpose on the lodestar calculation factors long excluded from it.[6]

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[6] The legislative history to Section 1988(b) approvingly cites, in addition to *Johnson*, three district court cases applying *Johnson* to determine fee awards. See S. Rep. No. 1011, *supra*, at 6. One of those three involved a downward adjustment, and the other two involved an enhancement. See *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975) (14% less than requested amount); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974) (27% enhancement based on contingency risk, quality of representation, and results obtained); *Van Davis* v. *County of Los Angeles*, No. 73-63-WPG, 1974 WL 180, at *2-3 (C.D. Cal. 1974) (14% enhancement based on results obtained). This Court nonetheless has since precluded enhancements on one of the very bases—contingency—for the enhancement in *Stanford Daily*. See *Dague*, 505 U.S. at 566-567. This snippet of legis-

2. *The lodestar in this case reflects a reasonable attorney's fee*

a. Examination of the lodestar calculation in this case illustrates how quality of performance and results obtained are reflected in a district court's determination of reasonable hourly rates and billable hours.

The district court here apparently used hourly rates up to the high end of the relevant market for the type and quality of legal services performed. See Pet. App. 144a (district court's acceptance of lead trial counsel's hourly rate "near the high end of the Atlanta market"); *id.* at 200a ("the district court used hourly rates already at the top of the relevant market") (Tjoflat, J., dissenting from denial of rehearing en banc). Indeed, those hourly rates were the ones proposed by respondents themselves. *Id.* at 140a-144a. Respondents had two lead trial counsel. Both attorneys submitted affidavits stating that the rates were "fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). One of these attorneys, a respected partner at "[t]he state's premiere litigation boutique,"[7] explained that the rates requested "correctly reflect the hourly rates my law

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lative history does not support enhancements based on quality of representation or results obtained any more than it supported enhancements based on contingency. See *Delaware Valley II*, 483 U.S. at 724 ("[T]he legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits.") (White, J.).

[7] Bondurant, Mixson & Elmore, LLP, *Firm Overview* (2009) <http://www.atlantageorgiatriallawyers.com/bondurant_mixson_elmore_overview.html>

firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis." J.A. 47 (Bramlett Dec.).

Similarly, the district court here recognized the sheer amount of work necessary to conduct this litigation. Respondents refer to the labor- and time-intensive investigation and the contentious and burdensome discovery process required to litigate this case. Br. in Opp. 2-3. But such factors are accounted for in the large number of billable hours—over 25,000 hours in total—that the district court used in the lodestar calculation. Pet. App. 144a-149a.[8]

Respondents have already conceded that "a *reasonable fee* cannot be enhanced; rather, an upward adjustment is only appropriate where the fee as initially calculated by the lodestar would otherwise be *unreasonable*." Br. in Opp. 26. But their own affidavits confirm that the hourly rates used for the lodestar calculation were "reasonable." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). That reasonableness determination was expressly based on the market rate for legal services that they themselves thought were "of comparable quality rendered in cases demanding similar skill, judgment and performance." *Ibid.* And the district court accounted for the laborious nature of the case by accepting some 25,000 billable hours of work (but deeming additional hours

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[8] As noted above (pp. 3-4, *supra*), the district court reduced by 15% the total number of non-travel hours claimed by respondents because the hours claimed were excessive. Pet. App. 145a. But such a reduction cannot justify a lodestar enhancement. To the contrary, this Court has suggested that when a district court reduces the number of hours claimed for reasons such as given here, that reduction weighs *against* an enhancement for superior performance. See *Delaware Valley I*, 478 U.S. at 566-567.

excessive). Therefore, by respondents' own standard, no enhancement for quality of representation or results obtained would be appropriate in this case.

In sum, the district court impermissibly "double counted" the quality of representation and results obtained: once in accepting near top-of-the-market hourly rates and the vast majority of billable hours claimed by respondents, and again in adding a sum to reward counsel's commensurate top-of-the-market performance. Few lawyers, performing any kind of work on behalf of any kind of client, receive both top-of-the-line base pay and gigantic bonuses. The district court's 75% performance bonus—a $4.5 million increase over the $6 million lodestar amount—is unnecessary to make the attorney's fee award reasonable in this case.

b. According to respondents' attorney affidavits, the lodestar amount was less than what a private-fee arrangement might have produced not because of any failure to reward the quality of representation or results obtained, but rather because the hourly rates did not account for contingency risk and delayed payment of attorney's fees and expenses. J.A. 41 (Lowry Dec.), 57 (Bramlett Dec.). But whether those separate factors may support an enhancement appears to be outside the question presented in this case. See Pet. i ("Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced *based solely on quality of performance and results obtained* when these factors already are included in the lodestar calculation?") (emphasis added). Nor did respondents appear to raise those separate factors as independent support for the district court's judgment in their brief in opposition at the certiorari stage.

In any event, none of those factors would justify an enhancement. This Court has squarely held that "no contingency enhancement whatever is compatible with the fee-shifting statutes." *Dague*, 505 U.S. at 565. And the Court has implicitly rejected the notion that delayed payment of attorney's fees and delayed reimbursement for advanced expenses could justify an enhancement. These delays, after all, are common—the rule rather than the exception—in the type of class action at issue, and thus would require an enhancement in almost every such case. See Pet. App. 34a. That would mean the calculation of the lodestar would rarely end the inquiry on attorney's fees—an outcome this Court has found unacceptable. See *Dague*, 505 U.S. at 563. Moreover, the delay in payment is offset (at least in significant part) by use in the lodestar calculation of the hourly rates prevailing at the completion of a case, rather than the usually lower rates in effect at the time the work was done. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (*Delaware II*) ("In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value."). Accordingly, assuming this Court decides that the enhancement cannot be supported solely on the basis of quality of representation and results obtained, the court of appeals judgment should be reversed.[9]

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[9] Respondents were denied reimbursement of expert fees by the courts below, pursuant to this Court's decision in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991) (holding that Section 1988(b) does not permit recovery of expert fees). Pet. App. 14a; see note 1, *supra*. District courts should not be permitted, when awarding reasonable attorney's fees, to use an enhancement as a mechanism to

C. Enhancement Of The Lodestar Award For Quality Of Representation Or Results Obtained Is Not Necessary To Satisfy The Statutory Objectives

The purpose of federal fee-shifting statutes is to enable private parties to obtain legal representation in order to vindicate important rights under federal law. See, *e.g.*, S. Rep. No. 1011, *supra*, at 2 (The "purpose and effect" of Section 1988(b) is "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866."); *Delaware Valley I*, 478 U.S. at 565 ("[T]he aim of [fee-shifting] statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."); *Hensley*, 461 U.S. at 429 (Section 1988(b) was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances.").

While Congress intended that "fees [be] adequate to attract competent counsel," it also cautioned that fee awards should "not produce windfalls to attorneys." S. Rep. No. 1011, *supra*, at 6; accord H.R. Rep. No. 1558, *supra*, at 9; see *Delaware Valley I*, 478 U.S. at 565 (fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client"). The statutory purpose is fully satisfied if plaintiffs, like the respondents in this case, are able to

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circumvent *Casey*'s limitation that the statutory term "attorney's fees" does not include expert fees, or to circumvent any other limitation on fees imposed by statute or decisions of this Court.

retain qualified counsel "based on the statutory assurance that he will be paid a 'reasonable fee.'" *Ibid.*[10]

1. As this Court has recognized, fee enhancement for quality of representation or results obtained is not necessary to attract counsel in fee-shifting cases. See *Delaware Valley I*, 478 U.S. at 566 ("[I]t is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance."). Even accepting a generous construction of this Court's past dicta, fee enhancements are allowable only in "rare" and "exceptional" cases. *Blum*, 465 U.S. at 898 The small chance that an attorney's post-retention performance will be deemed so "exceptional"—above and beyond the quality of service that market rates contemplate—is highly unlikely to factor into the attorney's *ex ante* decision whether to take a fee-shifting case.

Nothing in the record here, for example, indicates that Children's Rights, Inc.—a public interest law firm dedicated to improving child welfare systems through litigation (Pet. App. 54a)—had received an enhancement in a prior case or expected to receive an enhancement in this one. Likewise, nothing in the record indicates that the private firm factored in the remote possibility of an enhancement beyond the lodestar amount in deciding to

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[10] The absence of express congressional authorization for quality-related enhancements is especially important when the fee-paying defendant is the federal government. Fee-shifting statutes represent a limited waiver of sovereign immunity, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), and, as such, must be strictly construed, *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). Thus, in determining whether a "reasonable" attorney's fee may include an enhancement for the quality of representation or results obtained, courts should be guided by the statutory language and what Congress "clearly and unequivocally" intended. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

bring this litigation. To the contrary, Children's Rights, Inc. and its private co-counsel have an impressive record of bringing such impact litigation without the promise of higher-than-market monetary rewards. J.A. 27-31 (Lowry Dec.); Pet. App. 53a-56a. It is right and necessary that lawyers of this demonstrated quality receive reasonable attorney's fees, including hourly fees at or near the top of the market, for bringing successful actions. But the possibility of an enhancement beyond those fees based on quality of representation or results obtained goes beyond what is needed to attract counsel in this or other similar cases. See *Delaware Valley I*, 478 U.S. at 567 ("Clearly, [plaintiff] was able to obtain counsel without any promise of reward for extraordinary performance.").

Nor is a performance-based enhancement necessary to encourage retained counsel's best efforts. An attorney who accepts a case arising under a fee-shifting statute is ethically obligated, as is any attorney in any case, to represent her client to the best of her legal ability. See, *e.g.*, Model Rule 1.1 ("A lawyer shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Model Rule 1.3 cmt. (A lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and "must * * * act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). Pursuant to these professional norms, lawyers every day provide best efforts for fees similar to what respondents' counsel would receive under the lodestar award, without any prospect of substantial monetary bonuses.

2. That enhancements based on quality of representation and results obtained are not necessary to fulfill the statutory objectives does not mean enhancements are never proper. In particular, enhancements may be necessary where (unlike here) the client or case is so unpopular or otherwise controversial that the attorney suffers professional or financial damage from the representation. In such a case, the lodestar amount may be unreasonable because it does not compensate the attorney for the extent of his loss. See *Delaware Valley I*, 478 U.S. at 565 (enhancement proper only in "rare and exceptional" cases) (citation omitted).

Judge Carnes acknowledged this possibility in referring to cases in which an attorney's "representation vindicates the federal rights of an unpopular client and as a result that attorney suffers a loss of standing in the community which damages his practice and income." Pet. App. 49a; see *id.* at 206a-207a n.2 (Carnes, J., dissenting from denial of rehearing en banc); see also *Guam Soc'y of Obstetricians & Gynecologists* v. *Ada*, 100 F.3d 691, 697-699 (9th Cir. 1996) (enhancement appropriate where representation "was deemed extremely undesirable in the community" and "local counsel faced unusual and trying personal and professional pressures," including death threats), cert. denied, 522 U.S. 949 (1997); cf. *NAACP* v. *Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972) (noting, in support of attorney's fees award, that at that time "a lawyer representing black plaintiffs in an employment discrimination case, or in any civil rights litigation, is likely to suffer social, political and community ostracism"), aff'd in relevant part, 493 F.2d 614 (5th Cir. 1974). In that scenario, not encountered here, the lodestar amount likely would not provide adequate compensation because market rates do

not incorporate such dramatic harms to an attorney's practice and income. Accordingly, an enhancement may be necessary to fulfill the statutory purpose of ensuring access to counsel in such cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's Fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert Fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

AMICUS CURIAE BRIEF

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(7)

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No. 08-970

In the Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*, *Petitioners*,

v.

KENNY A., by his next friend Linda Winn, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, HAWAII, IDAHO, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?

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BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, HAWAII, IDAHO, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA

INTEREST OF AMICI CURIAE

On a daily basis, each of the 30 *Amici* States and the District of Columbia ("the States") are engaged in litigation that is subject to a federal fee-shifting statute. The States appear here to request that, in cases in which a civil rights plaintiff prevails against a State, "reasonable attorney's fees" remain just that: reasonable. 42 U.S.C. § 1988(b).

Every penny spent by the States litigating the amount of an attorney's fees, and then paying the ultimate award, comes from the taxpayers' pockets. Loss of these monies adversely affects government programs—sometimes, the very same programs that the plaintiffs successfully litigated to enhance. Limiting fee awards to what is "reasonable" therefore not only gives effect to § 1988(b)'s plain language, it is sound public policy.

SUMMARY OF ARGUMENT

The Court should expressly hold that an award of "reasonable attorney's fees" under 42 U.S.C. § 1988(b) cannot encompass enhancements to the lodestar calculation based on the quality of

representation or the results obtained. Achieving favorable results is the trigger for receiving awards under § 1988(b), and the quality of a particular attorney's representation is reflected in the lodestar element concerning that attorney's hourly rate. A bonus, post-lodestar enhancement for achieving favorable results or superior quality of representation would therefore constitute an unreasonable—and thus statutorily impermissible—double-counting of these factors.

Beyond adherence to the plain language and legislative history of § 1988(b), as well as precedent of the Court, the States offer five reasons why the Court should adopt Petitioner's bright-line rule rejecting the use of 'results obtained' or 'quality of representation' as post-lodestar enhancements:

1. The purpose of § 1988(b) is to attract competent counsel to file and litigate civil rights actions. Post-lodestar enhancements are unnecessary to achieve that goal.

2. Granting post-lodestar enhancements against the States further drains the public fisc. Because the lodestar calculation alone renders a "reasonable attorney's fee," 42 U.S.C. § 1988(b), sound public policy favors spending additional monies on funding State programs that benefit taxpayers, not plaintiffs' attorneys.

3. Instead of engaging in protracted litigation, States often settle class action lawsuits because it is in the best interest of their citizens. But if lower courts are going to interpret such settlements as

superior results for the plaintiff, and thus grant sizable post-lodestar enhancements to their attorneys, the States will lose the incentive to negotiate sound public policy for fear of punitive fee awards.

4. Embracing post-lodestar enhancements creates yet another battle in the already-protracted, post-litigation war over attorney's fees.

5. Crafting objective standards to judge the quality of an attorney's performance, or his result, is impossible; thus creating a quagmire the Court has consistently tried to avoid.

* * *

Should the Court instead decide that some rare and exceptional cases warrant post-lodestar enhancements for superior quality of representation or results obtained, it should hold that this is not one of those cases. Here, the lodestar-calculated award constituted a "reasonable attorney's fee," 42 U.S.C. § 1988(b), especially where the pre-enhancement award (1) encompassed the plaintiffs' attorneys' quality of work, (2) far surpassed the compensation of public attorneys general, and (3) was reduced by the trial court because the plaintiffs submitted "excessive" billing hours.

ARGUMENT

I. THE COURT SHOULD HOLD THAT A LODESTAR-CALCULATED ATTORNEY'S FEE AWARD CANNOT BE FURTHER ENHANCED BASED ON THE "QUALITY OF REPRESENTATION" OR THE "RESULTS OBTAINED."

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546 (1986), this Court stated that "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" *Id.* at 565. Like Petitioner, the States now ask the Court to transform its sound reasoning into a bright-line rule: It is unreasonable, and therefore statutorily impermissible, to enhance a lodestar calculated fee award under 42 U.S.C. § 1988(b) for either the results obtained or the quality of the representation.

Petitioner effectively argues why the plain language and legislative history of § 1988(b), as well as the Court's precedent interpreting § 1988(b) and similar fee-shifting statutes, reject the use of 'results obtained' and 'quality of representation' as enhancements to the lodestar award. We do not duplicate that effort here. Instead, the States offer five additional reasons why the Court should reject the use of results-based, post-lodestar enhancements.

A. Post-Lodestar Enhancements Are Unnecessary to Achieve § 1988(b)'s Purpose of Attracting Competent Attorneys to Represent Civil Rights Plaintiffs.

Without "congressional authorization" in the form of a fee-shifting statute, district courts are generally powerless to order a losing party to pay the expenses of a prevailing party's attorney.[1] *Delaware Valley I*, 478 U.S. at 561-62. Congress's purpose in granting fee-shifting power under § 1988(b) was both clear and limited: "[T]o ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)).

Section 1988(b), like similar Congressional fee-shifting statutes, "[was] not designed as a form of economic relief to improve the financial lot of attorneys, nor [was it] intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." *Delaware Valley I*, 478 U.S. at 565. "Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Id.*

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[1]None of the exceptions to this rule—*i.e.* (1) willfull violation of a court order, (2) bad faith by the losing party, or (3) cases in which a plaintiff recovered a "common fund for themselves and others through securities or antitrust litigation"—are present in this case. *Delaware Valley I*, 478 U.S. at 562, n.6.

As a result, as long as plaintiffs "find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Id.* In the case of § 1988(b), monetary enhancements above-and-beyond what is necessary to ensure that competent counsel will represent a civil rights plaintiff constitute an unnecessary—and therefore unreasonable—windfall. *See Blum v. Stenson*, 465 U.S. 866, 897 (1984) ("The legislative history [of section 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'") (quoting S. Rep. No. 94-1011, p. 6 (1976)); *Hensley*, 461 U.S. at 443-44 ("Section 1988 manifests a finely balanced congressional purpose to provide plaintiffs asserting specified federal rights with 'fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.'") (Brennan, J., dissenting) (citation omitted).

1. Application of the lodestar method alone is more than sufficient to attract competent—indeed, excellent—counsel to litigate § 1983 claims. The lodestar calculation equals "the product of reasonable hours times a reasonable rate," *Delaware Valley I*, 478 U.S. at 565, and the courts look to an attorney's skill and experience to derive the reasonable hourly rate for that attorney. Accordingly, by definition, the lodestar calculation (1) accounts for an attorney's quality of work and (2) provides an incentive—or, at the very least, removes the financial disincentive—for seeking out civil rights litigation.

In fact, if anything, the unenhanced lodestar method tends to overcompensate attorneys by encouraging the practice of "overbilling" hours to receive massive gross fee awards. *See* Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). This case provides a prime example.

Respondents' attorneys received lodestar rates ranging from $215 per hour for the most junior attorneys to $495 per hour for the most senior. Pet. App. 141-44. To put these rates in perspective, assuming 2,000 billable hours per year, the unenhanced lodestar calculation granted Respondents' attorneys gross annual revenues of $430,000 apiece for the most junior attorneys and $990,000 apiece for the most senior attorney.

These mega-firm-sized hourly rates appear to be the norm rather than the exception in federal fee-shifting cases. *See, e.g., Lopez v. S.F. Unified Sch. Dist.*, 385 F. Supp. 2d 981, 986-87 (N.D. Cal. 2003) ($460 per hour for partner at Skadden Arps); *Common Cause v. Jones*, 235 F. Supp. 2d 1076, 1081 (C.D. Cal. 2002) ($455 per hour for attorneys at Munger, Tolles, and Olson). Indeed, one recent study in California determined that "the rates awarded in civil rights cases . . . are not only higher than the average rates, but actually are closer to the rates of partners in large law firms." Michael Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. Rev. 825, 846 (2004). Such top-dollar rates

are unquestionably "higher . . . than necessary to attract counsel" to litigate § 1983 claims, *id.* at 845; *a fortiori,* there is no need for post-lodestar enhancements.

2. That top-notch attorneys continue to file and litigate civil rights claims under § 1983, without a guarantee of post-lodestar enhancements, further proves that such enhancements are unnecessary to attract competent counsel. Again, this case provides a prime example.

Respondent is represented by the Children's Rights Group and its founder, lead counsel Marcia Robinson Lowry. According to its website, the Children's Rights Group has filed and litigated class-action lawsuits regarding child welfare systems in 16 States. *See* Children's Rights, *Legal Cases,* http://www.childrensrights.org/reform-campaigns/legal-cases/ (last checked June 24, 2009). Only two of these lawsuits were filed after the district court awarded the disputed enhancements in this case in October 2006. *Id.*

That the Children's Rights Group filed at least 14 class action suits before receiving the present 75% enhancement shows that the availability of sizable post-lodestar enhancements was not necessary to persuade the group to litigate § 1983 claims regarding child welfare system.[2] To the contrary, the Children's Rights Group, like most public interest

[2] In fact, Ms. Lowry received a lower hourly rate for work on a contemporaneous child welfare system case. Pet. App. 10.

groups, continues to litigate these claims because it is their stated mission: "[F]ighting to enshrine in the law of the land every child's right to be protected from abuse and neglect and to grow up in a safe, stable, permanent home." *See* Children's Rights, *Mission and Methods,* http://www.childrensrights.org/about/mission-and-methods/ (last checked June 24, 2009).

Nor do post-lodestar enhancements appear to be necessary to entice private law firm attorneys to assist in civil rights litigation. As noted by the court of appeals, Respondents' private counsel, Jeffrey O. Bramlett, not only received the enhanced lodestar award for his work in this case, he also received an award "for dedication to justice and fair treatment for all people" and was elected the President of the Georgia State Bar Association the year after this case settled. Pet. App. 52-53.

Mr. Bramlett and his law firm are not acting alone. According to the Georgetown Law Center's Pro Bono Institute, the nation's largest law firms increased their pro bono hours by 170% between 1995 and 2007. *170 Percent Increase in Law Firm Pro Bono over Past Twelve Years*, available at http://www.probonoinst.org/press.news.php. The reasons are numerous: Pro bono work provides training for newer attorneys; it improves retention; and, it assists the firm in achieving community recognition. *See, e.g.*, Esther Lardent, *Making the Business Case for Pro Bono*, Feb. 2000, available at http://www.probonoinst.org/pdfs/businesscase.pdf.

Simply put, receiving 100% of a lodestar-calculated award, plus multiple non-monetary benefits, appears to be more than sufficient "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). Post-lodestar enhancements are simply icing on an already-sweetened cake.

3. A comparison between statutory fee awards for successful plaintiff's attorneys and the compensation of State attorneys who defend the same cases further shows that post-lodestar awards are unnecessary to attract attorneys to litigate in the public's interest—whether it be as public or private attorneys general.

When the district court enhanced Respondents' $215 to $495 per hour fee awards by 75% in 2006, the average salary of division chiefs in state Attorneys General Offices ranged from $39,000 to $147,000—or $19.50 to $73.50 per hour based on a 2000 hour work year.[3] National Association of Attorneys General, *Statistics on the Office of the Attorney General, Fiscal Year 2006*, p. 37-39 (on file with counsel). In Georgia, where this case was litigated, the highest paid division chief received $117,680, or just under $59 per hour. *Id.* at 38. Georgia's entry-level attorneys received $48,000 per year, or $24 per hour. *Id.*

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[3]The salaries of entry-level assistant attorneys general in 2006 ranged from $33,000 to $90,500 nationwide. National Association of Attorneys General, *Statistics on the Office of the Attorney General, Fiscal Year 2006*, p. 37-39.

The following hourly-rate chart captures the *pre-enhancement* disparity:

	Plaintiffs	Georgia A.G.	Disparity
Senior Atty.'s:	$495	$59	838%
Junior Atty.'s:	$215	$24	896%

Admittedly, the disparity is somewhat skewed because private firms, when they act as private attorneys general, take on overhead costs that are not reflected in a public attorney's general salary (although such overhead costs plainly do not require an eight-fold multiplier). Thus, a more proper comparison may be between private counsel representing plaintiffs and the State.

Petitioner's outside counsel, Mark Cohen, has previously represented the State of Georgia in similar cases for $175 per hour in 2002 and $225 per hour in 2006. Pet. App. 149, n.6. These "rates are approximately one-half of what an attorney of Mr. Cohen's experience and ability would generally charge a private client." *Id.* In comparison to Respondents' counsel, Mr. Cohen represented the State in 2006 for less than half of senior counsels' pre-enhancement award the same year.

To be clear, our point is not to insist that plaintiff's attorneys should be compensated at a level below the lodestar calculated rate. It is simply to point out that countless attorneys are attracted to civil rights cases under § 1983 as public and private

attorneys general without the promise of post-lodestar enhancements for a job well done. In fact, many litigate such matters for sub-lodestar compensation. Thus, in § 1988(b) parlance, it is 'unreasonable' to award post-lodestar enhancements when 100% of the lodestar calculation is more than sufficient to attract competent counsel on both sides of the table. *See Blum*, 465 U.S. at 897 ("The legislative history [of section 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'") (quoting S. Rep. No. 94-1011, p. 6 (1976)).

B. Post-Lodestar Enhancements Levied Against Public Entities Harm Taxpayers, Public Programs, and in Some Cases, the Successful Plaintiffs.

When the States or their agencies are the defendants in litigation subject to fee-shifting statutes, fee awards are paid out of the public fisc. Thus, any unreasonably high attorney's fees award, by definition, unreasonably shifts money from taxpayer's pockets into the coffers of the plaintiffs' attorneys.

When such a diversion occurs, the people suffer. Either tax rates will increase, or funding for government programs will diminish. *See Horne v. Flores*, No. 08-289, slip op. at 11 (June 25, 2009) ("When a federal court orders that money be appropriated to one program, the effect is often to take funds away from other important programs."). In fact, an unreasonable application of fee-shifting statutes may even divert resources away from

precisely those agencies and programs that benefit the class of plaintiffs on whose behalf the lawsuit was brought. *See, e.g., Christiansburg Garment Co. v. Equal Emp. Opp. Comm.*, 434 U.S. 412, 422 n.20 (1977) (recognizing that "every attorney's fees assessment against the [Equal Employment Opportunity] Commission will inevitably divert resources from the agency's enforcement of Title VII"); *Lopez v. San Francisco Unified Sch. Dist.*, 385 F. Supp. 2d 981, 987 (N.D. Cal. 2003) (recognizing that "the class members who are students in SFUSD will be directly impacted by any award of attorneys' fees to counsel, as it will reduce the resources that the District can use to provide an education to the class members"); *McPherson v. School District #186*, 465 F. Supp. 749, 757 (S.D. Ill. 1978) (noting that "it cannot be ignored that defendant is a public body and a fee award is essentially reallocating a portion of the property tax area residents pay towards furthering the educational process").

Take the present case for example. The plaintiffs' lodestar-calculated fee award exceeded $6 million for three years work; a "reasonable" fee award under any stretch of § 1988(b)'s plain language. Yet, the district court's post-lodestar enhancements for "quality of representation" and "results obtained" added an additional $4.5 million to the attorneys' haul—$4.5 million that Petitioners could be spending on any number of important government programs, including implementation of the mediated improvements to Atlanta's child welfare system.

Again, our point is not to deny "reasonable attorney's fees" to successful plaintiffs' attorneys. 42 U.S.C. § 1988(b). It is to point out that, once the court calculates a reasonable fee award under the lodestar, sound public policy disfavors diverting additional public monies away from government programs toward plaintiffs' attorneys.

C. Post-Lodestar Enhancements Discourage Settlements by the States That Public Policy Should Encourage.

A State defendant's interests are different from those of a private defendant. The State exists to serve its citizenry. Thus, in civil rights cases, the State defendants generally exist to serve both sides: the plaintiffs and the defendants. For this reason, a State's interest in settling litigation may be simply to effectuate good public policy. In other words, settlements that enhance public services while avoiding the costs of protracted litigation can be 'win-win' situations for the States.

It is no secret that the primary—and often sole—impediment to settlements is the question of attorney's fees. The prospect of a post-settlement enhancement to the lodestar that may escalate into the millions of dollars poses a significant disincentive to a State otherwise amenable to settlement. This is particularly true where the State has a reasonable chance of prevailing on the merits and avoiding having to pay any fees.

To make matters worse, lower courts appear to be more likely to grant such results-based

enhancements following settlements. It is easy for courts to misinterpret the State's decision to enter into a pre-trial settlement as a superior "result obtained" by the superior "quality of representation" by plaintiff's counsel, instead of a sound public policy decision by the State.

Such a misinterpretation may have occurred in this case. The district court based its findings of superior representation and results obtained, in part, on the observation that "even if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." Pet. App. 154. Yet, the court's reasoning overlooks the possibility that the State simply chose to spend its resources to swiftly fix the problem *in lieu of* engaging in expensive, protracted litigation.

Securing sound public policy outcomes will frequently involve different solutions than a court could have ordered in litigation.[4] And sometimes these solutions provide greater benefits to the public than any class of plaintiffs could have achieved through litigation; *i.e.*, more than the law actually demands. This Court should not sanction

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[4]For example, settlements sometimes include an agreement by the State to seek or enact new legislation; something that a court cannot order. *See, e.g.*, www.decentschools.org (discussing the settlement in *Williams v. California*, Superior Court of the State of California, County of San Francisco, Case No. 312236, in which the State of California agreed in 2004 to enact new legislation to improve California schools).

enhancements that effectively penalize States for acting reasonably (and often creatively) in the settlement process, rather than digging their heels into the litigation battlefield.

D. Post-Lodestar Enhancements Encourage Protracted Fee Litigation.

While the Court has stated that "[a] request for attorney's fees should not result in a second major litigation," *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Hum. Res.*, 532 U.S. 598, 609 (2001), in practice, it has. Battles over attorney's fees play a major part in class action warfare.

Disagreements over the lodestar values (*i.e.* number of hours and hourly rates) crop up in most fee award battles. Adding post-lodestar enhancements into the calculative mix only heightens and lengthens the dispute. For this reason, among others, the Court rejected enhancements for attorneys retained on a contingency fee basis in *City of Burlington v. Dague*, 505 U.S. 557 (1992). *Id.* at 566 (stating that the "interest in avoiding burdensome satellite litigation . . . counsel[s] strongly against adoption of contingency enhancement").

Lengthening fee disputes by adding post-lodestar enhancements is not only counter-productive for State defendants (and their taxpayers), but also for the courts. "[F]ee disputes now command an estimated ten percent of federal judges' time." Charles Silver, *Unloading the*

Lodestar: Toward a New Fee Award Procedure, 70 Tex. L. Rev. 865, 906-07 (1992), and "[f]ee enhancements number among the chief causes of fee litigation today." *Id.* at 953. Indeed, "as the frequent battles over fee enhancements clearly show, the administrative costs of efforts to 'fine tune' fee awards are unacceptably high." *Id.* at 911; *see also* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 436, 462 (noting the "considerable secondary litigation over attorney fees" that has placed large "burdens . . . on the judicial system," and recognizing that "[c]alculating the fee to be awarded is perhaps the . . . most difficult problem in the world of fee awards").

As Justice Brennan has noted, appeals from awards of attorney's fees "must be one of the least socially productive types of litigation imaginable." *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). Once again, this case provides a prime example. The present fee award dispute, which has centered primarily on the use of post-lodestar enhancements, has lasted three-and-a-half years (and counting)—a longer period than it took to resolve the underlying litigation on the merits.

This should not be surprising. Prevailing attorneys have every incentive to seek every enhancement possible because they are essentially playing with house money. In a classic "heads I win, tails you lose" scenario, once an attorney has prevailed in a lawsuit subject to fee shifting, he is virtually guaranteed to recover all of his fees for time

spent litigating his fees. *See, e.g.*, Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 28 & n.149 (Fed. Judicial Ctr. 2d ed. 2005) (noting that the courts are "unanimous" that "work on [a] fee petition and litigating a fee dispute" is compensable under fee-shifting statutes). And for those attorneys who seek enhancements and win, the payouts can be quite extraordinary, as evidenced by the $4.5 million enhancement in this case.

Of course, every game has a loser. In the case of enhancements against State defendants, it is the public at large. The taxpayers bear the additional court costs of litigating fee awards. The taxpayers bear the burden of funding the State's defense. Should the plaintiff's attorneys win, the taxpayers pony up the award too. And all of this additional spending either results in new taxes or cuts in government programs.

E. Enhancements Lead to Arbitrary and Unpredictable Fee Awards.

Throughout its fee award precedent, this Court has emphasized that fee calculations should be as objective as possible and that methods that lead to subjective and potentially arbitrary awards should be avoided:

- In *Hensley*, the Court adopted the lodestar method as the starting point for calculating fees in large part because the lodestar "provides an *objective basis* on which to make

an initial estimate of the value of a lawyer's services." 461 U.S. at 433 (emphasis added).

- In *Delaware Valley I*, the Court noted that the "major fault" of using the '*Johnson* factors'[5] to determine fee awards was that the 12 factors "gave very little actual guidance to district courts." 478 U.S. at 563. The Court further commented that "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Id.* The lodestar method, in contrast, was preferred because it "provided a more analytical framework for lower courts to follow than the unguided 'factors' approach provided by *Johnson*." *Id.* The Court further cautioned that "allowing the courts to adjust the lodestar amount based on considerations of the 'riskiness' of the lawsuit *and the quality of the attorney's work* could still produce inconsistent and arbitrary fee awards." *Id.* (emphasis added).

- In *Dague*, this Court rejected use of contingency enhancements in part because they "would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." 505 U.S. at 566.

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[5] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

This Court's statement in *Delaware Valley I* that enhancements may be permitted, if at all, only in "rare" and "exceptional" cases, 478 U.S. at 565, has done little to reduce the arbitrary nature of fee awards because "there is no bright-line rule as to what constitutes an 'exceptional' case," and "no uniform definition for an exceptional case has emerged." Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorney's Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 Md. L. Rev. 228, 257 n.183 (2006). Certainly, there is no unanimity on what constitutes a superior "quality of representation" or superior "results obtained." *See, e.g.*, Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 290, 292 (1977) ("[R]egardless of which factor is being rewarded by inflating the hourly rate, the process of selecting an appropriate multiplier has been essentially arbitrary," and thus "[t]he only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency.").

These arbitrary and inconsistent results can be avoided by adopting Petitioner's bright-line rule that no lodestar calculated award can be enhanced based on findings of superior quality of representation or results obtained.

II. EVEN IF THIS COURT PERMITS THE USE OF POST-LODESTAR ENHANCEMENTS IN RARE AND EXCEPTIONAL CASES, THE ENHANCEMENTS IN THIS CASE WERE UNREASONABLE.

For the reasons set forth above, the *Amici* States believe that post-lodestar enhancements for quality of representation and results obtained should never be permitted. However, should the Court leave the door open for use of such enhancements in rare and exceptional cases, it nonetheless should reverse the $4.5 million post-lodestar enhancement in this case for any of three reasons.

1. The plaintiffs' pre-enhancement award of $6 million constituted a "reasonable attorney's fee" under 42 U.S.C. § 1988(b) because it already accounted for the plaintiffs' favorable result and the quality of their counsel. (If anything, the award was overly generous.) The district court calculated the lodestar using top-of-the-market, large firm billing rates that ranged from $215 per hour for the most junior attorneys to $495 per hour for the most senior attorney. Pet. App. 141-44. The district court justified these high lodestar billing rates based in part on "the stellar performance of plaintiffs' counsel throughout this long and difficult case." Pet. App. 144.

In other words, this is not an exceptional case where the lodestar failed to adequately account for the quality of work performed by plaintiffs' counsel. The lodestar in this case squarely, and generously, reflected this factor. Accordingly, the district court's subsequent enhancement of the lodestar based on

quality of representation improperly double-counted this factor—sending the once "reasonable" (and very generous) attorney's fee award into unreasonable territory.

2. The district court's finding that many of respondents' attorneys' hours were "vague" and "excessive," Pet. App. 145, strongly counsels against deeming this a rare or exceptional case warranting an enhancement for superior representation. *See Delaware Valley I*, 478 U.S. at 566-67 ("The District Court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'").

3. As outlined *infra* at pages 10-12, the pre-enhancement awards in this case compensated the plaintiffs' attorneys at hourly rates double that of Georgia's outside counsel and eight times that of Georgia's assistant attorneys general. If "rare" or "exceptional" cases justifying post-lodestar enhancements existed, perhaps they would arise if successful counsel's hourly lodestar rate fell below opposing counsel's hourly rate. But the Court should reject the notion that it is reasonable under § 1988(b) to enhance the awards of private attorneys general who are already being compensated well above their public counterparts under the lodestar method.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF GEORGIA, ET AL.,

Petitioners,

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, PUBLIC JUSTICE, P.C., THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE IMPACT FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice ("AAJ"), Public Justice, P.C., the National Employment Lawyers Association, and the Impact Fund respectfully submit this brief as *amici curiae*. Letters of consent of the parties have been filed with the Court.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. An important part of AAJ's mission is the education of attorneys to be the most effective advocates for their clients. AAJ views the prohibition of enhanced fee awards for exceptional representation as a threat to private enforcement of our civil rights laws.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system, and the protection of the poor and powerless. Public Justice has litigated numerous cases under federal civil rights and other statutes that provide for the award of a reasonable attorney's fee. We believe that district courts' discretion to adjust fee awards for

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or counsel make a monetary contribution to its preparation.

superb performance and exceptional results is crucial to achieving the purposes of federal fee-shifting statutes and to ensuring that plaintiffs who proceed under those statutes obtain high-quality counsel.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized, including with respect to the proper allocation of attorney's fees.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. In its funding role, the Impact Fund reviews requests for grants to cover expenses of civil rights litigation and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It also represents non-profit organizations in their fee litigation. The Impact Fund's experience attests to the fact that the

growing expenses of impact litigation have made it much more difficult to attract counsel to public interest cases in many parts of the country. For many of The Impact Fund's grantees and co-counsel, the expense of litigation can make the difference in whether important public interest cases are filed.

SUMMARY OF THE ARGUMENT

1. The attorneys representing plaintiffs in this case rendered remarkable service for their clients and achieved extraordinary results. After uncovering the appalling conditions affecting children in Georgia's foster care program, the attorneys saw that compensation for individual child-victims was not enough. They sought fundamental changes to fix a broken bureaucracy so that the system would serve all Georgia's foster children. To that end, they obtained class action status for the children in Georgia's two largest counties, conducted extensive discovery into conditions there, and obtained compelling expert opinion regarding the steps needed to bring the system up to constitutional minimum standards.

The state defendants engaged in a strategy of resistance designed to defeat plaintiffs' action and preserve the status quo by wearing down their less-resourced opponents. Nevertheless, after three years of proceedings and mediation, the parties reached an accord. The consent decree mandates specific improvement in thirty-one areas and requires that progress be monitored and made public by an independent body.

The district court awarded attorney's fees to plaintiff class, starting with the reasonable hours

multiplied by the prevailing hourly rate. The court then adjusted that initial figure, taking into account the exceptional representation and results achieved in this case. Stating explicitly that those factors were not considered in arriving at the lodestar amount, the court multiplied the lodestar by 1.75 to arrive at a reasonable attorney's fee.

2. The district court's fee award in this case was well within its discretionary authority under 42 U.S.C. § 1988.

a. Congress intended to vest federal judges with authority to take into account the quality of representation and the results achieved. The plain meaning of "reasonable attorney's fee" in the context of representing individuals whose rights have been violated includes the notion that a better result warrants a higher fee. The overwhelming choice of retainer for such representation – the contingency fee – is based on precisely that premise.

Second, the fact that Congress authorized court-awarded fees only for prevailing plaintiffs reflects the intent to make results an important factor in fee awards.

Third, Congress could have expressly limited fees to the product of hours times the proper rate, as it did in other fee-shifting statutes enacted near the same time.

Finally, the legislative history cited an appellate decision and three district court cases as examples of proper fee calculations, all of which either awarded fees adjusted on the basis of representation and results or approved of such adjustments.

b. This Court, has consistently declined to limit attorney's fees to the lodestar amount and has emphasized the district court's discretion to adjust that amount. This Court established a strong presumption in favor of the lodestar amount, imposing the burden on the fee applicant to show that enhancement based on the quality of representation and results is justified. Plaintiffs in this case made the necessary showing, and the district judge made the requisite detailed findings.

c. This Court should not adopt the Solicitor General's suggestion that district courts be required to take into account performance and results in the particular case when setting the hourly rate for the lodestar, rather than apply a multiplier to the lodestar. In any event, the lodestar in this case did not include those factors, so that use of the multiplier was appropriate.

3. The public policy arguments raised against enhancement of the lodestar are not persuasive.

a. Congress did not limit a "reasonable attorney's fee" to compensation for the minimum effort required for a plaintiff to prevail. Congress intended civil rights lawsuits to enforce compliance with the civil rights laws and that fee awards enable plaintiffs to pursue a full measure of justice. That attorneys should be compensated for achieving exceptional results is what Congress intended for "private attorneys general."

b. The argument that court-awarded fees burden taxpayers and divert revenues from other worthwhile activities does not warrant immunity for state defendants. Violations by state actors are at

least as great a threat to citizens' civil rights as violations by private parties, and Congress intended fee awards in such cases to be paid by state governments.

c. There is no indication that fee enhancements – long approved by this Court and allowed in every federal circuit – hinder settlements. This case itself resulted in a consent decree. Prohibiting enhancement in all cases would eliminate a bargaining chip and make it more likely that defendants would persist in taking cases to trial. In any event, this policy argument, like those above, are most appropriately made to the legislature.

ARGUMENT

I. THE ATTORNEYS IN THIS CASE PROVIDED EXCEPTIONAL REPRESENTATION AND OBTAINED EXCEPTIONAL RESULTS FOR THE PREVAILING PLAINTIFF CLASS.

This case is celebrated as a textbook example of the effective use of tort law principles, not simply to obtain a remedy for a legal wrong, but to reform a broken government bureaucracy and make it work. *See* John T. Pardeck, CHILDREN'S RIGHTS: POLICY AND PRACTICE 161-62 (2d ed. 2006) (summarizing the preparation of this case).

The Complaint filed by the Children's Rights attorneys on June 6, 2002 charged Georgia's Department of Family and Children Services (DFCS) with failing the very children it is supposed to protect. Of immediate concern were the DeKalb and Fulton county emergency shelters, designed to provide short-term accommodations. Children

languished there for months in dirty, overcrowded conditions, lacking needed medical services and exposed to violence, sexual assault, prostitution, gang activity, and drugs. The district court found that plaintiffs had uncovered "terrible" and "dangerous" conditions at the shelters. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1279 (2006). In lieu of an injunction, DFCS closed the shelters by February 13, 2003. *Id.* at 1267-68l; *Kenny A. v. Perdue*, 218 F.R.D. 277, 284 n.2 (2003).

But the dangers that stalked Georgia's foster children were not limited to those shelters. Later in 2003, both the Commissioner of the Georgia Department of Human Resources and the Director of the Division of Family and Children Services resigned in the wake of several recent tragic child deaths. Craig Schneider, *Child Welfare Chief Has Tough Job, DeKalb Office Under New Leadership*, ATLANTA J. & CONST., Oct. 29, 2003, at B1 (reporting on the controversy surrounding the DeKalb office, linked to recent child deaths, including a 2-year-old boy who was twice returned by DFCS to his home despite complaints of abuse and who was thereafter beaten to death by his stepfather); Craig Schneider, *Acting DHR Commissioner Named*, ATLANTA J. & CONST., Nov. 22, 2003, at D2, (reporting the appointments of new directors of the Department of Human Resources and DFCS).

The Children's Rights advocates recognized that these dangers would not be significantly reduced by seeking compensation for individual victims. Thousands of lives would continue to be wasted because of massive systemic failures rooted in a severe lack of funding, widespread mismanagement,

and crushing caseloads. In August of 2003, the district court took a major step toward addressing those systemic issues by granting plaintiffs' motion for class action status and ordering the case to proceed to trial on behalf of all 3,000 foster children in Fulton and DeKalb Counties. 218 F.R.D. at 305.

Petitioners, as the district court recounted, "vigorously fought plaintiffs' claims for almost three years, filing both motions to dismiss and for summary judgment, as well as seeking repeatedly to limit plaintiffs' discovery efforts." 454 F. Supp. 2d at 1266. The court was forced to admonish Petitioners for relying on technical objections "in order to delay and hinder the discovery process." *Id.* at 1268. Petitioners' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.*

Petitioners' strategy was one that is familiar to trial lawyers. The class of foster children, of course, were unable to hire counsel to assert their rights. Class counsel were not paid as they worked on the case and advanced some $1.7 million of their own money to cover expenses. *Id.* at 1288. Petitioners aimed at prevailing simply by exhausting their less-resourced opponents.

For example, as the district court indicated, defendants greatly increased plaintiffs' expenses by delaying discovery and refusing to cooperate in a joint record review. *Id.* at 1277. Their motion for summary judgment included a 74-page memorandum, a 126-page statement of undisputed material facts, a 48-page statement of legislative facts, six separate affidavits, and three volumes of

appendices containing expert reports and voluminous additional documents. 454 F. Supp. 2d at 1281.

The suit ended after three years with a consent decree. The state agreed to undertake thirty-one separately detailed steps, including commitments to investigate reports of abuse or neglect, regular visits by caseworkers, licensing of foster homes, and prompt delivery of medical and dental care. Two child welfare specialists will serve as the court's independent accountability agents charged with the responsibility of measuring and reporting publicly on the state's progress and compliance with the decree. *Id.* at 1289-90. It was, as the court stated, sweeping and comprehensive relief for the class that was truly extraordinary. *Id.* The parties also agreed that the plaintiff class was entitled to an award of attorney fees under 42 U.S.C. § 1988. *Id.* at 1269.

The district court carefully employed the lodestar analysis. After arriving at the reasonable number of hours to be compensated, the court ascertained the appropriate hourly rate for the several categories of legal counsel, representing the prevailing market rate in the community for similar services by lawyers of comparable skills, experience, and reputation. *Id.* at 1284. The product of those two figures yielded the "lodestar" amount for this case.

District Judge Shoob further determined that this was "the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 1288, quoting

Blum v. Stenson, 465 U.S. 886, 899 (1984); and *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

The court made explicit findings and explained in detail why the representation and results obtained by counsel were extraordinary and were not at all reflected in the hourly rates used to obtain the lodestar amount.

> Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled legal representation, and the Court would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients.
>
> Finally, the evidence establishes that plaintiffs' success in this case was truly exceptional. . . . [E]ven if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as "intricately detailed and comprehensive" as that contained in the Consent Decree.

454 F. Supp. 2d at 1289-90 (record citations omitted).

On that basis, the district court multiplied the initial lodestar amount by 1.75, which it deemed "the minimum enhancement of the lodestar necessary to

reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 1290.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RECOGNIZING EXCEPTIONAL REPRESENTATION AND RESULTS BY APPLYING A MULTIPLIER TO THE LODESTAR AMOUNT WHERE THE LODESTAR CALCULATION DID NOT TAKE THOSE FACTORS INTO ACCOUNT.

The Question Presented in this case, especially as modified by Petitioners' Brief on the Merits, is narrow and easily answered. Congress and this Court have made clear that the quality of representation and the results obtained by plaintiffs' counsel are appropriate factors in determining a reasonable attorney's fee under § 1988. As to the second part of Petitioners' Question Presented – whether "these factors [are] already included in the lodestar calculation" – the district made specific and detailed findings that they were not.[2]

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[2] The Question Presented in the Petition, on which this Court granted certiorari, asked: "Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained *when these factors already are included in the lodestar calculation?* (emphasis added)

A. Congress Intended to Vest District Courts with Discretion to Enhance Attorney Fees to Account for the Quality of Representation and Results.

The Civil Rights Attorneys Fees Awards Act of 1976 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . ., or title VI of the Civil Rights Act of 1964 . . ., *the court, in its discretion, may allow the prevailing party*, other than the United States, *a reasonable attorney's fee* as part of the costs.

42 U.S.C § 1988 (emphasis added).

Congress enacted this provision to provide meaningful enforcement of the substantive provisions of the civil rights laws through private civil actions, "a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402 (1963).

Petitioner makes much of the fact that the statute contains no mention of "enhancement" or of "multipliers" applied to the lodestar. Petitioners' Br. 19. However, it is clear that Congress intended that a "reasonable attorney's fee" take into account the quality of representation and the results obtained in the particular case, over and above the product of hourly rate times reasonable hours.

First, the plain meaning and common usage of "attorney's fee" includes the notion of a greater fee for better results. For the type of legal service involved here, representing persons who have suffered legal injury and seek to vindicate their rights in court, attorneys are retained in the overwhelming number of cases on a contingency fee basis. Indeed, the contingent fee, in which the attorney receives a larger fee for obtaining a larger recovery for the client, is "the dominant system in the United States by which legal services are financed by those seeking to assert a claim." F. MacKinnon, CONTINGENT FEES FOR LEGAL SERVICES, 4 (1964). *See also* Herbert M. Kritzer, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 58-59 (1990) (empirical evidence indicating that the contingent fee is the overwhelming means used by individuals and small businesses seeking to obtain legal representation to assert claims).

Even many corporate clients of law firms that traditionally bill by the hour have moved to modify their retainer agreements to incentivize counsel by offering higher fees or bonuses for exceptional results. *See, e.g.*, Nathan Koppel & Ashby Jones, *Billable Hour Under Attack*, WALL ST. J., Aug. 24, 2009, at A1 ("[B]ig companies are fighting back against law firms' longstanding practice of billing them by the hour."); ABA Formal Op. 94-389 (Dec. 5, 1994); Richard C. Reed, *Value Billing: An Update from the ELP Section's Task Force*, 14 LEGAL ECON., Sept. 1988, at 20 (reporting trend to compensate lawyers based on results, not hours).

Congress "intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex

Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011 at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. [hereinafter "Sen. Rep."].

A second indication is found in the statute's plain text. Congress could have accomplished its purpose of providing access to the courts and encouraging private attorneys general by awarding fees to all plaintiffs or at least to all those with non-frivolous claims. By limiting fee awards to "prevailing" plaintiffs, Congress recognized that results affect fees. As Chief Justice Burger later stated, "[Plaintiffs'] success is an important factor for calculating fee awards. Any system for awarding attorney's fees that did not take account of the relationship between results and fees would fail to accomplish Congress's goal of checking insubstantial litigation." *Hensley*, 461 U.S. at 448 (Burger, C.J., concurring).

Third, it is clear that if Congress had wanted to limit fee awards to reasonable hours times the prevailing rate for similar services, it could have done so expressly. In fact, at about the same time Congress was adopting § 1988, it also enacted a fee-shifting provision in the Consumer Product Safety Commission Improvements Act of 1976 that expressly limited court-awarded attorney fees to the lodestar amount:

> [A] reasonable attorney's fee is a fee (1) which is based upon (A) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person

> in an action brought under this section, . . . and (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

15 U.S.C.A. § 2060(f). Nor is this the only example. Congress included fee provisions substantially identical to that quoted above in 15 U.S.C.A. § 2059(e)(4) (Supp. 1977) (Repealed by Pub. L. 97-35., Title XII, § 1210, Aug. 13, 1981, 95 Stat. 721); and in the Natural Gas Pipeline Safety Act Amendments of 1976, 49 U.S.C.A. § 1686c (Supp. 1977) (Repealed by Pub. L. 103-272, § 7(b), July 5, 1994, 108 Stat. 1389).

Congress would have similarly limited § 1988 if it had so intended.

Finally, and eliminating any doubt on this score, the Senate Report accompanying what would become § 1988 pointed to the Fifth Circuit's relatively recent decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), as articulating the "appropriate standards" for the reasonableness of attorney fees. The *Johnson* court enumerated 12 factors to be considered in arriving at a reasonable fee, which included the hours spent by the attorney and "the customary [hourly] fee for similar work in the community." 488 F.2d at 718. But the court also required judges to consider as separate factors "the results obtained" as well as "the attorney's work product, his preparation, and general ability before the court." *Id.* Thus an inexperienced attorney who performed extraordinarily well could receive a fee above his or her market rate and "not be penalized

for only recently being admitted to the bar." *Id.* at 719.[3]

In addition, the Senate report held up three district court decisions as examples where the appropriate standards were "correctly applied." Sen. Rep. at 6, 1976 U.S.C.C.A.N. 5908, 5913. All three indicate that Congress intended that the district courts recognize exceptional work and exceptional results by awarding higher fees.

In *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), the court increased the fee from the lodestar figure of $37,500 to an award of $47,500, stating, "the attorneys' work, and the results which they obtained through their work merit an increase in the base figure upon which a reasonable attorneys' fees award is computed."

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[3] Significantly, the *Johnson* court stated, *id* at 720, that these factors reflected considerations it had approved in a civil rights class action in which the trial judge's views of counsel's abilities strongly resembled those of District Judge Shoob in this case:

> [P]laintiffs' counsel marshalled an impressive array of facts, skillfully analyzed them, and presented them lucidly. . . It would be an injustice not to mention the legal ability displayed by plaintiffs' lead counsel. As an advocate his skill in this case would rank him among the most able who have appeared before me in my three and a half years on the bench.

Clark v. American Marine Corp., 320 F. Supp. 709, 712 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

In *Davis v. County of Los Angeles*, 8 Emp. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) counsel "achieved excellent results for the plaintiffs" and, based on the judge's observations of counsel's performance, "an award of fees above the normal hourly rates" was deemed appropriate.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), the district court awarded $175,000 in fees in a school desegregation case, taking into account not only the customary hourly rate in federal court, but also counsel's "exceptional" ability and "excellent" results. *Id.* at 484, 486.

As this Court observed, the approving reference to these cases in the legislative history confirms that Congress intended that "the level of a plaintiff's success is relevant to the amount of fees to be awarded" under § 1988. *Hensley*, at 430.

B. This Court Has Consistently Recognized the Trial Judge's Authority to Adjust Attorney's Fees to Account for the Quality of Representation and Results.

Federal courts soon found that the *Johnson* twelve-factor analysis gave too little actual guidance to trial judges. For that reason, when this Court first addressed the matter in *Hensley*, the Court adopted the "lodestar" approach first developed by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973), *appeal after remand*, 540 F.2d 102 (1976). The lodestar approach differed from and was more focused than the *Johnson* analysis.

Nevertheless, the lodestar method also recognized that multiplying the attorney's reasonable hours by the reasonable hourly rate "does not end the court's inquiry into the value of the attorney's services." 487 F.2d at 168. Rather, the court instructed trial judges to "adjust" this lodestar amount to take into account the quality of the attorney's work and the results obtained. *Id.*

This Court in *Hensley* adopted *Lindy's* two-step analysis, paraphrasing directly from the Third Circuit's discussion. The Court stated that the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate is the "most useful starting point for determining the amount of a reasonable fee." 461 U.S. at 433. However, that calculation "does not end the inquiry," and the court may adjust the initial lodestar figure up or down based on the "results obtained" in the case, which the Court termed a "particularly crucial" factor in adjusting the lodestar amount. *Id.* at 434.

The Court noted that the district court also may consider "other factors" identified in *Johnson,* but cautioned that many of those other factors "usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.* at 434 n.9. Obviously, the Court was stating that *Johnson* factors *other than the results obtained* are usually accounted for in the lodestar. The Court made this even clearer by citing *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc), where the court of appeals adopted the *Lindy* lodestar method. The court explained, "The "lodestar" itself generally compensates lawyers adequately for their time. An upward adjustment for

quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client." *Id.* at 894. While cautioning against redundant application of some *Johnson* factors, the court stated that "the amount or nature of recovery was not considered in setting the 'lodestar'" so that enhancement was appropriate. *Id.* The district court in this case followed that same course.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court restated that the proper first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 888. That hourly rate, the Court held, is, as Congress intended, the prevailing market rate. *Id.* at 893-94 and nn. 9 & 10. Prevailing market rates by definition do not reflect the exceptional representation or results in the particular case at hand. The Court therefore expressly *rejected* the same argument resurrected by Petitioners in this case: "[W]e cannot agree with petitioner's argument that an 'upward adjustment' is never permissible." *Id.* at 897. Instead, the Court reaffirmed its position in *Hensley* that a reasonable fee may include enhancement for results obtained. *Id.*

The *Blum* Court emphasized that the fee applicant bears the burden of showing that enhancement is appropriate in the particular case. In the absence of specific evidence to the contrary, there is a strong presumption that the product of reasonable hours times a reasonable rate represents a "reasonable" fee. *Id.* at 898. Upward adjustment is justified "only in the rare case where the fee

applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899. The attorneys in *Blum* made no such showing, *id,* but this is precisely the showing that plaintiffs made in this case and that Judge Shoob carefully set out in his opinion below.

The Court in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546 (1986), again stated that there is a "strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a 'reasonable' fee." 478 U.S. at 565. Yet the Court also made clear that this is a rebuttable presumption, and "upward adjustments of the lodestar figure are still permissible . . . in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id.* at 565, quoting *Blum*, 465 U.S. at 898-901.

The Court made clear that it would have upheld the enhancement of attorney's fees in the case before it if there had been an "indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation," *id.* at 567, and if the lower court had made detailed findings "as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate." *Id* at 568. Because the district court made those findings in this case, the attorney fee award should be upheld.

This Court has consistently restated its adherence to the principle that a reasonable fee should take into account quality of representation

and success. *See Marek v. Chesny*, 473 U.S. 1, 11 (1985). ("the most critical factor in determining a reasonable fee is the degree of success obtained.") (internal quotes omitted); *Evans v. Jeff D.*, 475 U.S. 717, 737 n.26 (1986) ("[T]he product of reasonable hours times a reasonable rate does not end the inquiry," and the district court has discretion to adjust a basic fee); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (proper approach is for the district court to arrive at an initial estimate and then "adjust this lodestar calculation by other factors"); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("'[T]he degree of the plaintiff's overall success goes to the reasonableness' of a fee award under *Hensley.*"); *cf. City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (enhancement of the lodestar to reflect the risk of loss disallowed because that factor is "already subsumed in the lodestar").

Following this Court's consistent position, every federal circuit has held that the initial lodestar calculation may be enhanced if enhancement is supported by specific evidence. In addition to the Third Circuit's decision in *Lindy*, and the D.C. Circuit's in *Copeland*, *see, e.g.*, *Adams v. Zimmerman*, 73 F.3d 1164, 1178 (1st Cir. 1996) (recognizing upward adjustment to lodestar amount based on results obtained); *Green v. Torres*, 361 F.3d 96, 99 (2d Cir. 2004) (In "cases of exceptional success an enhanced award may be justified."); *Johannssen v. District No. 1-Pac. Coast Dist., MEBA Pension Plan*, 292 F.3d 159, 181 (4th Cir. 2002) ("Grants of an enhancement are both discretionary and rare, and the applicant bears the burden of proof of an exceptional result."); *Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008), *aff'd by equally divided*

court en banc, ___F.3d___ (5th Cir., Aug. 10, 2009) (upholding fee enhancement based on attorney's extraordinary performance in the case); *Geier v. Sundquist*, 372 F.3d 784, 793-96 (6th Cir. 2004) (upward adjustment of lodestar for quality of representation permissible in rare and exceptional cases); *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993) (fee enhancement available where "counsel offers specific evidence that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional."); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir. 1999) (upward adjustment for superior quality of service and results obtained "in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts."); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (upward adjustment "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and the success was exceptional"); *Roe v. Cheyenne Mtn. Conf. Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) ("The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional."); *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) (enhancement permissible "if the results obtained are exceptional" and "there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed.") (internal quotations and citations omitted throughout).

Every federal court agrees that the "lodestar" is "a star that leads" the traveler. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1329 (1981). Or, as this Court has frequently stated, it is "the guiding light of our fee-shifting jurisprudence." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), *quoted in Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). It is not, as Petitioners argue, always and in all cases the final destination. Nor has any court disagreed that the trial judge, who has the best vantage point for observing counsel's performance and assessing the results achieved, ought to be accorded broad discretion, based on specific evidence, to adjust the lodestar amount to arrive at a reasonable fee.

C. The District Court in this Case Properly Exercised Its Discretion in Recognizing Exceptional Quality of Representation and Results by Applying a Multiplier to the Lodestar Amount, Which Did Not Include Those Factors.

The trial court in this case adhered to the Court's instructions closely. District Judge Shoob recognized that, if quality of representation and results obtained "are already reflected in the lodestar amount" they may not serve as bases for enhancement. 454 F. Supp. 2d at 1288. He found, however, based on specific evidence submitted by plaintiffs' counsel, that "the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation." *Id.* The court also specifically found the superb quality of their

representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. In addition, the result obtained by counsel was not only exceptional; in the district court's view it was unique. "[T]he Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

The panel opinion by Judge Carnes erroneously stated that the "stellar performance" of plaintiffs' counsel in this case had already been considered in setting counsel's reasonable hourly rate, and was therefore built into the lodestar. *Kenny A. v. Perdue*, 532 F.3d 1209, 1226-27 (11th Cir. 2008). To the contrary, the district court was correctly applying Eleventh Circuit precedent holding that the best evidence of the prevailing market rate in the relevant legal community for similar services "is the applicant attorney's customary billing rate for fee-paying clients," although that information is not conclusive. 454 F. Supp. 2d at 1284, citing *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11th Cir. 2000). Observation of counsel's performance confirmed for the court that counsel's Standard Hourly Rate charged to fee-paying clients was within the range of rates prevailing in the Atlanta market. 454 F. Supp. 2d at 1285. *See also Duckworth v. Whisenant*, 97 F.3d 1393, 1396-97 (1996) (Based on "ample opportunity to assess the lawyering of this case," the court can determine whether the attorney's hourly rate is in line with market rates in the community "for similar services by lawyers of reasonably comparable skills.").

As the district court specifically stated, the court did not include either the quality of counsel's performance or the results obtained in setting the hourly rate for purposes of calculating the lodestar. 454 F. Supp. 2d at 1288-89. For this Court to reverse the fee award in this case would not eliminate "double counting." It would eliminate any discretion on the part of the district court to consider extraordinary representation and exceptional results as factors in arriving at a reasonable fee, contrary to the intent of Congress and this Court's precedents.[4]

Significantly, the United States agrees with Respondents that a reasonable attorney's fee should take account of quality of the attorney's representation. However, the Solicitor General proposes that the district courts accomplish this by manipulating the hourly rate used to calculate the lodestar itself, rather than by applying a multiplier to the lodestar, as the court did in this case:

> A district court thus has the opportunity, when setting the reasonable hourly rate, to take into account not only the attorney's prior

---

[4] Indeed, it would eliminate the trial judge's discretion under numerous "other federal fee-shifting statutes," since "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *City of Burlington v. Dague*, at 562. One scholar estimates, "[t]here are over 200 federal statutes . . . that provide for shifting of attorney's fees." John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1588 (1993). See also the Appendix to the Eleventh Circuit's en banc opinion below 547 F.3d 1319, 1337-39 (partial list of 80 statutes allowing award of reasonable attorney's fee to prevailing party).

> experience and qualifications, *but also his performance in the very case at hand*. . . . By this means, the lodestar itself reflects exceptional skill or ability not only in the attorney's prior work, but in his handling of the case at issue. The circumstance articulated by the Court in *Blum* as possibly justifying an enhancement – where "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged," 465 U.S. at 899 – therefore simply does not arise *when the lodestar rate has been properly determined.*

Brief of United States 19-20. (emphasis supplied).

Because the district court in this case expressly stated that the lodestar rate was not determined in this fashion, the Solicitor General should not object to affirming the fee award at issue here.[5]

Amici strongly disagree with the suggestion that this Court "make conclusive the presumption that the lodestar (*assuming its components are properly*

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[5] This analysis may have been influenced by the fact that the Brief of the United States addressed the Question Presented as it was originally phrased in the Petition, which assumed that "quality of performance and results obtained . . . already are included in the lodestar calculation." Br. of the United States I.

The Solicitor General concedes that enhancement is appropriate when it is based on factors not accounted for in the lodestar amount. Br. of the United States 18-19 n.5, 30. That is precisely the case here.

set) represents a reasonable attorney's fee." Br. of United States 18. (emphasis supplied).

The Solicitor General offers no persuasive reason why the trial court should be required to take the quality of the attorney's representation into account when setting the lodestar rate. To do so would overturn this Court's decision in *Blum*, that Congress intended the lodestar rate to reflect the prevailing market rate for similar legal services. 465 U.S. at 893-94. Instead, this Court should embrace the cautionary advice offered by Justice Brennan in *Hensley:*

> If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high as to constitute an unmistakable windfall.

461 U.S. at 455 (Brennan, J., concurring in part).

III. Enhancement of Fees to Reflect Exceptional Representation and Exceptional Results Does Not Offend Public Policy.

The fact that the district court determined the amount of a reasonable attorney's fee under § 1988 in this case precisely as intended by Congress, in the manner prescribed by this Court, and in accord with all other federal circuits should warrant affirmance. Nevertheless, Petitioners and several supporting amici argue that for public policy reasons this Court

should mandate that the lodestar amount must never be augmented. *See* Pet'r. Br. 42-56; Brief of the States of Alabama, *et al.*, ["Br. of States"] 4-21; Brief of the National Governors Ass'n, *et al.* ["Br. of Governors"].

A. A Reasonable Court-Awarded Attorney's Fee Is Not Limited to Paying Counsel for Only Bare Minimum Representation.

Petitioners, along with amici representing others who may be involved in civil rights violations, ask this Court to take a narrow, minimalist view of the Civil Rights Attorney's Fees Awards Act. In Petitioners' view, "the entire purpose of the Act is to enable plaintiffs to attract competent counsel while avoiding windfalls." Pet'r Br. 60. *See also id.* at 20. Enhancement of fees for superior performance is not necessary to fulfill this purpose, because – it is postulated – there will always be attorneys who will take such cases for no more than the lodestar amount. *See* Br. of States 5-6; Br. of Governors 14-16. It is therefore "unreasonable" to compensate attorneys for more than the minimum effort required for plaintiff to prevail on his or her claim, so long as there is a competent attorney willing to represent plaintiffs on such terms. *Id.*

Consequently, Petitioners assert, any enhancement based on obtaining "sweeping relief" on a "comprehensive scale" with "far-reaching significance" is excessive. Pet'r. Br. 47-48. *See also* Br. of Governors 13 ("The purpose of the fee shifting statutes is to 'attract competent counsel.' It is not to motivate competent counsel, once retained, to perform exceptionally or attain exceptional results.");

Br. of States 6: ("[M]onetary enhancements above-and-beyond what is necessary to ensure that competent counsel will represent a civil rights plaintiff constitute an unnecessary – and therefore unreasonable – windfall.").

Judge Carnes's opinion below went so far as to characterize the successful efforts by plaintiffs' counsel to improve the lot of Georgia's foster children beyond the absolute minimum demanded by the due process clause as "analogous to relief on a meritless claim." *Kenny A. v. Perdue*, 532 F.3d 1209, 1230 (11th Cir. 2008):

> Just as *Dague* instructs us that fee awards should not underwrite efforts to obtain relief where none is due under the law, neither should they underwrite efforts to receive more or better relief than that due under the law. . . . Just as encouraging non-meritorious claims cannot have been an objective of the fee-shifting provisions, neither can encouraging results that go beyond what the law allows have been an objective.

Id.

Congress has never taken such a crabbed and miserly view of the effective enforcement of the civil rights of Americans. The purpose of the Civil Rights Attorney's Fee Awards Act is not simply and solely to provide the victims of civil rights violations with access to competent attorneys, though that is an important function. The Act's broader objective is to safeguard the rights of all Americans by enabling

ordinary citizens to enforce compliance with federal civil rights laws, including compliance by state officials. "In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. *Unless the judicial remedy is full and complete, it will remain a meaningless right.*" H.R. Rep. No. 94-1558 at 1 (1976) (emphasis added) [hereinafter "House Rep."]. Without the traditionally effective remedy of fee-shifting "our civil rights laws . . . become mere hollow pronouncements which the average citizen cannot enforce." Sen. Rep. at 6, 1976 U.S.C.C.A.N. at 5913.

Civil rights lawsuits were not viewed by Congress as matter to be merely tolerated. They are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402 (1963).

In Congress's expansive view, ordinary citizens bringing suit not only vindicate their own rights, they act as "private attorneys general" to enforce the civil rights laws rather than rely on an expansive enforcement bureaucracy. Sen. Rep. at 4, 1976 U.S.C.C.A.N at 5911. Thus, the fee-shifting provision in § 1988 is "an integral part of the remedies necessary to obtain" compliance with civil rights laws. *Id.* at 5, 1976 U.S.C.C.A.N at 5913. Indeed, Congress expressly intended that attorney's fees not be reduced to minimum levels simply because they involve nonpecuniary rights, but rather "the amount of fees awarded [should] be governed by the same standards which prevail in other types of equally

complex Federal litigation." *Id.* at 6, 1976 U.S.C.C.A.N at 5913.

Enhancement of attorney fees in those relatively rare cases of exceptional performance and results is fully consistent with the legislative purpose of providing fees to make available a judicial remedy that is "full and complete." House Rep. at 1.

B. Attorney's Fee Awards Against State Actors Are Not Objectionable on Grounds That They Are Funded by State Taxpayers.

Amici representing potential state defendants in civil rights suits argue that enhancements of attorney's fees are unreasonable because, as a result, "[e]ither tax rates will increase, or funding for government programs will diminish," including programs that are the subject of the suits. Br. of States 12-13. *See also*, Br. of Governors 9 (fee award amounts to a "federal court ordered contribution from the taxpayers of Georgia to a non-profit organization" that "will, of necessity, reduce the amount of state funds available to address other public needs").

This argument, of course, is not limited to the enhancement of attorney's fees but may be leveled against fee-shifting altogether in any case where state actors have been held to have violated federal civil rights laws. It is an argument that Congress addressed and rejected in enacting § 1988. After extensive hearings that included testimony by state officials, the Senate Judiciary Committee explained:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Sen. Rep. at 5, 1976 U.S.C.C.A.N. at 5913 (footnotes omitted). Pleas for a special immunity to shield state governments from the full measure of court-awarded costs, including reasonable attorney's fees, should be addressed to the legislature, not this Court.

In any event, such an immunity would undermine the statute's purpose of enforcing full compliance with federal civil rights laws. As this case amply demonstrates violation of those rights by state actors may be more to be feared and more difficult to root out than private wrongdoing.

In fact, as this Court has suggested, the threat of an award of attorney fees under § 1988 may actually save money for state governments overall by deterring civil rights violations in the first place. *Hudson v. Michigan*, 547 U.S. 586, 597-98 (2006).

Complaints about the size of the fee award are particularly ill-fitting in this case. As noted in Part I, *supra*, the state defendants rejected opportunities to reduce costs and instead adopted a strategy that greatly and unnecessarily increased the attorney resources and time required to pursue this action. The district court pointed out that these tactics

"undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." 454 F. Supp. 2d at 1268. In the end, the court stated, "the size of the [fee] award reflects State Defendants' strategy of resistance against efforts to reform a foster care system that even they ultimately admitted was badly in need of reform." *Id.* at 1296.

C. Enhancement of Attorney's Fees to Reflect Exceptional Representation or Results Does Not Discourage Settlement.

Amici supporting Petitioners also argue that permitting the enhancement of the lodestar amount to arrive at a reasonable attorney's fee discourages settlements of civil rights actions. These assertions are little more than speculation. The Governors Association brief, for example, asserts that fear of costly and unpredictable enhancement of attorney fees "will make States less likely to enter into consent decrees and more likely to litigate cases to judgment." Br. of Governors 4.

The Governors offer no explanation why enhanced fees are any less predictable than the lodestar amount itself. At the conclusion of the civil action, if the parties have not reached agreement on fees, prevailing plaintiffs' counsel submits records of hours, proof of prevailing rates, and, in exceptional circumstances, request for application of a multiplier. Opposing counsel has the opportunity to object to or rebut the evidence, and the court makes its determination. That determination is generally not predictable with great precision, even without the application of a multiplier. *See, e.g., Evans v. Jeff*

D., 475 U.S. 717, 735 (1986) (noting the "unpredictability of attorney's fees" awarded under § 1988).

The assertion that States will be more likely forgo settlement out of fear of fee enhancement and litigate to judgment is even less rational. If the State is certain to win at trial, it would not likely settle anyway. If the State insists upon going to trial and loses, it will have rendered itself liable to a far higher fee award due to the greater number of hours expended and, perhaps, a higher hourly rate. In addition, it will have expended its own additional costs and attorney fees. And the court may still enhance the lodestar amount in the exceptional case.

The States' brief suggests that some States may be willing to enter into a consent decree, not because they have violated federal civil rights laws, but "simply to effectuate good public policy" or to "enhance public services while avoiding the costs of protracted litigation." Br. of States 14. Enhancement of fees under such circumstances is "a significant disincentive to a State otherwise amenable to settlement," *id.* at 14, and "penalize[s] States for acting reasonably (and often creatively) in the settlement process, rather than digging their heels into the litigation battlefield." *Id.* at 16.

As discussed earlier, that is simply not this case. In this case, the State defendants indeed dug in their heels and engaged in a "strategy of resistance" that prolonged this litigation and increased its costs. 454 F. Supp.2d at 1296.

Equally to the point, upward adjustment of the lodestar amount has been approved by this Court

beginning with *Hensley* in 1983 and applied by every federal circuit. None of the critics of such enhancement have offered any evidence that it has prevented the settlement of any civil rights cases. Indeed, the parties in this case reached a settlement and entered into a consent decree that resolved the merits of the class claims.

Prohibiting enhancement of fees in all cases is actually more likely to hinder the settlement of civil rights cases. As this Court has recognized, court-awarded attorney fees under § 1988 can be useful to plaintiffs and defendants as a "bargaining chip." *Evans v. Jeff D.*, 475 U.S. 717, 731 n.20 (1986). Congress intended that attorney fees be a part of "the arsenal of remedies available to combat violations of civil rights." *Id.* at 732. Consequently, "[t]o promote both settlement and civil rights," this Court has recognized "the possibility of a tradeoff between merits relief and attorney's fees." *Id.* at 733.

Plaintiffs can, of course, waive enhancement of fees as well as the fees themselves. *Id.* at 737-38. To hold that enhancement of fees is never available under § 1988 would remove this bargaining chip and make it more difficult for plaintiffs to bring defendants to the bargaining table.

Neither Petitioners nor their supporting amici have advanced any compelling reason to prohibit the enhancement of fees in every case. To the extent their arguments are at all persuasive, they are most appropriately directed to Congress. Amici suggest that, because of the many variables that affect the reasonableness of attorney's fees and the myriad of different circumstances in which they arise, Congress and this Court wisely trusted the wisdom

and judgment of those who bear the responsibility of administering justice in civil rights cases.

As Justice Ginsburg pointed out regarding the scope of review of trial courts' determinations of the reasonableness of attorney's fees, "Judges of our district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters, in the event of an appeal, ordinarily qualify for highly respectful review." *Gisbrecht v. Barnhart*, at 808. The district court in this case properly exercised that broad discretion.

CONCLUSION

For the above reasons, the decision below should be affirmed.

Respectfully submitted,

August 28, 2009

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA IN SUPPORT OF PETITIONERS

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BRIEF OF THE ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER, SONNY PERDUE

INTRODUCTION

COMES NOW the Association County Commissioners of Georgia, as *Amicus Curiae*, and hereby submits the following brief in support of the Petitioner, Sonny Perdue, in his official capacity as Governor of the State of Georgia (the "State") and respectfully requests that this Court reverse the United States Court of Appeals' decision to allow an enhancement of respondents' attorneys' fees beyond the lodestar amount because of quality of performance and results obtained.

STATEMENT OF INTEREST[1]

The Association County Commissioners of Georgia ("ACCG") is a nonprofit instrumentality of Georgia's county governments. Formed in 1914 with nineteen charter county members, today ACCG serves as the consensus building, training, and legislative advocacy

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

organization for all 159 county governments in the State of Georgia. These counties are represented by more than 800 county commissioners. ACCG's constituency also includes 400 appointed county clerks, managers, administrators, and attorneys and more than 30,000 full-time and part-time employees. With this primary charge, ACCG works to ensure that the counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of their citizens.

ACCG and its members have a direct interest in this case. County governments are statutorily charged with fulfilling some of the most fundamental needs and rights of individuals, including providing law enforcement and emergency services, *see* O.C.G.A. §§ 36-8-1, 5, health services, *see* O.C.G.A. § 31-3-4, a court system, *see* O.C.G.A. §§ 15-7-4(a)-(b), 15-6-8(1), 15-10-2(5), 15-11-63, 65, legal defense for indigents, *see* O.C.G.A. §§ 17-12-1, 23, 24, and child protection services, *see* O.C.G.A. §§ 15-11-54 through 56.

In addition to being required to provide essential services to their constituents, counties are also charged with being good stewards of taxpayer funds. In fact, under the Georgia Constitution, county commissioners are deemed trustees of the people. 1983 Ga. Const., Art. I Sec. II Para. I. Taxpayer dollars spent on unreasonable litigation expenses takes money away from county taxpayers unnecessarily and makes it more difficult for counties to provide

the more than sixty mandated services they are required by law to provide to their citizens.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of facts as presented in the brief of the petitioner, Sonny Perdue.

ARGUMENT AND CITATION OF AUTHORITY

The district court in this case made several errors in awarding an enhanced fee to respondents' counsel, which, if affirmed, will establish harmful precedent that will diminish funds necessary for counties to perform their legally mandated duties. *Amicus Curiae* shows that its member counties and their taxpaying constituents could be directly harmed if this Court finds that a fee enhancement may be awarded to a prevailing party under 42 U.S.C. § 1988 merely for quality of representation and superior results alone. Additionally, *Amicus* shows that county taxpayers will experience unreasonable hardship due to unwarranted fee awards and increased litigation.

Because the district court's award of a fee enhancement is inconsistent with prior opinions of this Court, and because allowing enhancements for the aforementioned reasons could significantly harm county governments and their taxpayers, this Court should overrule the holdings of the district court and

court of appeals in this case and find that attorneys' fees may not be enhanced under the relevant federal fee-shifting statutes for mere quality of performance and superior results.

I. The District Court Abused Its Discretion, and the Court of Appeals Erred in Affirming an Enhanced Award of Attorneys' Fees to Respondents' Counsel Above the Lodestar Amount

The court of appeals' decision affirming an enhancement of attorneys' fees for respondent's counsel is based on misguided Eleventh Circuit precedent stating that "superior results coupled with superior performance can be the basis for an enhancement of the lodestar amount." *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209, 1238 (11th Cir. 2008). In spite of its disagreement with the holdings of prior panels, the court of appeals was bound in this case by the prior panel precedent rule and reluctantly affirmed the district court's award of an enhanced fee to respondents' counsel upon a finding that counsel provided quality performance and superior results. Although the court of appeals could have granted the State's motion for rehearing en banc and overruled the misguided precedent, that court, instead, denied the motion and provided this Court the opportunity to clarify the issue.

A. Quality Representation and Favorable Results Obtained Do Not Alone Justify an Enhancement to the Lodestar Amount

The district court in this case pointed to the "superb quality" of representation and "truly exceptional" results achieved by counsel as reasons to enhance the fee awarded to respondents' counsel. *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260 at 1289-1290 (N.D. Ga. 2006). These factors are erroneous grounds for upwardly modifying a lodestar amount.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court held that while a district court is in the best position to evaluate quality of performance, generally this factor "is reflected in the reasonable hourly rate . . . [and] may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence" that the performance of counsel was superior to what could reasonably be expected. *Blum*, 465 U.S. at 899. Later, this Court explained that *Blum* was intended to limit the factors upon which a district court could base an enhancement, and specifically rejected that several factors, including "quality of representation" and "results obtained" could serve as "independent bases for increasing the basic fee award." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

Accordingly, it was erroneous for the district court in the present case to modify respondents' counsels' fee award based on these factors. While the

district court acknowledged in its findings that the "superb quality" and "sweeping relief" obtained by respondents' counsel was "truly exceptional," *Kenny A.*, 454 F. Supp. 2d at 1289, it is plain from the decisions of this Court that these factors are simply improper bases for enhancing a fee award. In cases such as the present one, where there are no other rare or exceptional circumstances beyond performance and results, it is the lodestar figure that is the proper and reasonable fee.

B. Even if Quality Representation and Favorable Outcome May Sometimes Justify an Enhancement, Respondents Failed to Establish this Case as "Rare" or "Exceptional" to Warrant a Modification of the Lodestar

As indicated, there is a "strong presumption" that the lodestar figure represents a "reasonable fee," and "quality of representation" and "results obtained" cannot serve as grounds for a fee enhancement. *Del. Valley*, 478 U.S. at 565. However, when there may be reason for an upward modification, the "fee applicant bears the burden of establishing entitlement to an award." *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983). In the case at hand, the respondents failed to meet their burden of establishing entitlement to an enhanced fee award.

This Court has stated "when an attorney . . . accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability

. . . commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for th[is] factor[ ] . . . adequately compensates the attorney." *Del. Valley*, 478 U.S. at 565. In this case, respondents' counsel no doubt provided quality representation to their clients. However, such excellence should always be demonstrated and is expected when attorneys with the skill and experience of respondents' counsel in this case "perform to the best of [their] ability," as is their duty. *Id.* at 565. Absent some *specific evidence* that this case was "rare" or "exceptional," beyond what was to be expected from respondents' counsel, an enhanced fee award was improper.

To that end, the respondents in this case provided no specific evidence to support an enhancement, even for high quality of representation and results obtained, if enhancements were allowed for those reasons. The district court based its decision to grant an enhancement on essentially two factors: (1) personal observation of the record and respondents' counsels' performance and (2) affidavits by Atlanta attorneys offered by respondents' counsel. *Kenny A.*, 454 F. Supp. 2d at 1288-1290. However, because it is the fee seeking party's burden to establish that an enhancement is warranted, the district court's own observations of the court record and the quality of respondents' counsels' representation is of little consequence in the initial analysis.

The respondents themselves offered only the affidavits of five Atlanta attorneys who stated that

the quality of work produced in this case was deserving of an enhanced fee award. However, as the court of appeals pointed out, the attorneys providing the affidavits stand to profit from a decision allowing for enhancements in this case. *Kenny A.*, 532 F.3d at 1231-1232. As such, this evidence only serves to show the opinions of five attorneys who believe that enhancements should be awarded with a low standard, and does not establish that this case exhibited the "rare" and "exceptional" qualities that validate an enhanced fee award.

Accordingly, the respondents failed to meet their fundamental burden of providing specific evidence to justify an enhanced fee award, and the upward modification should therefore not have been granted to them by the district court.

C. Allowing Enhancements for "Quality of Representation" and "Results Obtained" Gives District Courts Unbridled Discretion for Fee Awards with Unfair and Harmful Results

If district courts are given the ability to award enhanced fees for "quality of performance" and "superior results," the true application will give district courts full discretion to grant fee enhancements at their whim, resulting in disparate awards among courts. As we have seen in this case, it is far too easy for a district court to find that the performance of a plaintiffs' counsel is one of the rarest quality, and the

achieved results are truly exceptional. If this standard is allowed to apply, there will likely be many cases that are found to be "rare" and "exceptional," simply because a district court is impressed by counsel. While a job well done is commendable, it is certainly not rare, and a fee enhancement is not an appropriate reward for doing what one is already obligated to do. Plainly, this formula is problematic and will prove harmful to the judicial system and to counties.

The consequence of allowing such fee enhancements to be awarded at the full discretion of a district court will result in unfairness and, thus, will undermine public confidence in the judicial system. As noted, if fees may be upwardly adjusted because of exceptional performance and results, district courts may award such enhancements simply because they feel an attorney did a particularly good job. However, some courts are likely to interpret the standard more conservatively and reserve enhancement awards for the truly rare and exceptional case where an attorney has not been fully compensated by the lodestar amount because of some unique extenuating circumstances.

As we have seen in other matters, the interpretation and application of the standard is likely to be widely diverse, resulting in some attorneys receiving windfall awards while others are simply awarded the lodestar fee. Large disparities in fees awarded across districts would be unfair and will be perceived as such by the public whose taxpayer dollars will be

used to pay the enhancements. This inequality will be harmful to the reputation and perception of judicial integrity.

Moreover, allowing district courts unbridled discretion to award attorneys' fees will futher reduce the foreseeability of litigation expenses. It is important for the efficient operation of government that counties are able to predict any major expenses that will be incurred. If district courts may award enhancements without a bright line standard, it will be difficult for a county, or any other entity required to pay such fees, to predict which level of fees will be granted, hindering the financial planning process beyond the existing burden. It is therefore important that this Court provide a clear standard as to when the lodestar fee may be enhanced by not allowing district courts to award modifications for mere quality performance and results.

II. An Enhancement of the Lodestar Amount for "Quality of Representation" and "Results Obtained" Does Not Further the Legislative Intent of the Fee-Shifting Statutes and Promotes Poor Public Policy

This Court has acknowledged that 42 U.S.C. § 1988, and other similar fee-shifting statutes, were enacted by Congress to provide an incentive for otherwise underrepresented clients to obtain competent legal counsel in certain important federal cases. *See Blum*, 464 U.S. at 893-894; *see also, Del. Valley*, 478

U.S. at 565. Congress certainly enacted these statutes as a way of protecting the public good and ensuring that adequate representation is provided to legitimate clients. Therefore, it is reasonable to assume that by enacting these statutes, Congress did *not* intend to bring about a policy that would harm the very public that it sought to protect by allowing increased amounts of taxpayer money to be paid in attorneys' fees without proper justification. If enhancements are to be awarded in the way that respondents' counsel contend and the lower courts in this case held, the end product is not only contrary to the intent of Congress, but also affirmatively creates a system that is contrary to good public policy by encouraging the squandering of taxpayer money that could be better utilized for the greater public good.

A. Unnecessary Enhancements to Fee Awards Are a Waste of County Tax Dollars and Have a Direct and Negative Impact on County Taxpayers

Cases involving government parties are unique for a number of reasons, but perhaps most distinctly because a harm caused by, and a redress ordered to come from a government cannot be isolated to an individual or a narrow group of violators. Because a government represents all of the citizens within its borders, any harm caused by a government is assigned to the constituents of that government. While this does not diminish the significance of the harm caused nor the amends owed to the violated, it does

create a unique circumstance whereby a broader context needs be evaluated. Care must be taken to ensure that a larger social harm is not initiated and that the rights of all taxpayers are not compromised in the effort to relieve the harm to a single party.

In the present case, evaluation of that broader context includes considering whether Congress's purpose in passing the fee-shifting statutes is advanced by allowing for unbridled awards of fee enhancements and considering the potential harm to external parties under such circumstances. While Congress's intent was served when respondents were able to secure competent counsel, it is unlikely that it was the prospect of earning an enhanced award that drew counsel to the case. On the other hand, good public policy is not served when taxpayer money was unreasonably awarded to respondents' counsel in the form of an enhanced fee.

Although governments typically do not seek to violate the law, and in fact, work diligently to uphold the law and protect the rights of their constituents, there are certainly times when agents of the government do breach their duties. In such instances, governments should be required to redress grievances for the harm caused, including any reasonable attorneys' fees when the law allows it. However, there is a notable difference in paying what is required to secure competent counsel for legitimate clients versus paying an amount above and beyond what is necessary, which serves only to enrich opposing counsel.

It is also important to consider that while it may appear that it is "the government" that is called upon to pay any enhanced attorneys' fees that may be ordered when harm is caused by its agents, in actuality, it is the taxpayers who ultimately bear the cost. In other words, it is the taxpayers who potentially suffer the consequences of reduced public services or increased taxes to compensate the wronged party. A service reduction or increase in taxes may be warranted when an important social good is achieved, such as a legitimate civil rights plaintiff securing competent representation; however, the use of taxpayer dollars cannot be justified when the outcome is simply "a form of economic relief to improve the financial lot of attorneys," as the enhancement is in the present case. *Del. Valley*, 478 U.S. at 565.

This argument is particularly poignant at the local government level. As previously noted, counties are statutorily required to provide some of the most fundamental public services to their citizens. *See supra* "Statement of Interest." In addition to the over sixty mandated services that Georgia counties are required to perform, they also provide countless discretionary services to their constituents, such as recreation, 1983 Ga. Const., Art. IX Sec. II Para. III(a)(5), *see* O.C.G.A. § 36-64-1 et seq., land use control, *see* 1983 Ga. Const., Art. IX Sec. II Para. IV; O.C.G.A. §§ 36-66-1, 2, green space and conservation, *see* O.C.G.A. § 12-6A-1, airports, *see* O.C.G.A. § 6-3-20, and mass transit, *see* 1983 Ga. Const., Art. IX Sec. II Para. III(a)(9). *See* 1983 Ga. Const., Art. IX Sec. II

Paras. III and IV; O.C.G.A. §§ 36-1-20, 36-5-22.1. Whether the services provided are mandatory or discretionary, the cost to provide these services must be budgeted by the county.

Counties operate with much smaller budgets than state and federal governments. Furthermore, unlike the federal government, each county is required to adopt and operate under a balanced budget. *See* O.C.G.A. § 36-81-2. According to the latest available information on Georgia county finances provided by the Georgia Department of Community Affairs, at least eleven counties had an operating budget of less than $5 million for the 2007 fiscal year. In fact, of the eleven counties listed, nine had an operating budget of less than the amount of the $4,419,599.18 lodestar enhancement awarded in this case, with the smallest county budget totaling no more than $2.1 million.[2] Accordingly, the allowance of unnecessary attorneys' fee enhancements could have a direct impact on counties' ability to perform mandated duties and to provide quality services to their citizens. While not every enhancement awarded will force counties to raise taxes or reduce services, it is certainly the case that the application of a lowered standard for awarding fee enhancements could have a direct and unnecessary impact on county citizens. If mere quality representation and favorable results are allowed to

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[2] Schley County had the smallest reported budget for the FY 07 budget year with a total budget of $2,125,054.

become the new threshold for fee modifications by the district court, there will be no limit to the amount of money that could be taken out of the pockets of taxpayers.

Because Congress's intended results for fee-shifting statutes are not better served by the unconstrained award of enhancements, and because county taxpayers would be directly and unnecessarily harmed by unreasonably unfettered enhanced fee awards, *Amicus* asserts that it would be inappropriate for this Court to uphold the lowered threshold for enhanced fee awards that have been approved by the lower courts in this case.

B. Unreasonable Enhancements Promote Meritless Lawsuits and Needless Satellite Litigation which Will Utilize Taxpayer Dollars Unnecessarily, Burden County Budgets, and Cause Administrative Hardships

In addition to the potential for lodestar enhancements to soar out of control and to operate as a misallocation of taxpayer dollars, the opportunity to earn huge awards will tempt attorneys to bring meritless claims and to initiate unnecessary satellite litigation, which could further injure county taxpayers.

This Court has held that the purpose of the fee-shifting statutes such as 42 U.S.C. § 1988 is to award "fees which are adequate to attract competent counsel,

but which do not produce windfalls to attorneys," *Blum*, 465 U.S. at 893-894; *see also Del. Valley*, 478 U.S. at 565, and that "burdensome satellite litigation," should be avoided, rather than encouraged. *Burlington v. Dague*, 505 U.S. 557, 573 (1992); *see also Hensley*, 461 U.S. at 437. However, precedent which allows attorneys' fees to be enhanced at the whim of a district court will no doubt allow some attorneys to enjoy windfalls. Additionally, due to the high opportunity for a large award set by this precedent, attorneys will be tempted to accept cases with little merit and engage in unnecessary litigation.

As the court of appeals in this case opined, "the lodestar amount will never suffice for attorneys who practice in this area. They will always believe, in all sincerity, that they deserve more and that the justice system will function better if they are paid more." *Kenny A.*, 532 F.3d at 1232. If there is no clear and strict standard by which a district court may award an enhanced fee, there will always be a viable opportunity for counsel to argue that an upward adjustment is warranted. The prospect of earning a large fee could motivate attorneys in these cases to aggressively seek that award, potentially increasing the amount of litigation against counties unnecessarily. As a consequence, county taxpayers would again bear the financial burden of funding needless litigation expenses.

As attorneys aggressively seek enhanced awards, counties and, therefore, county taxpayers will be forced to pay the tab for unnecessary litigation of attorneys' fees. While litigation expenses are often

necessary expenditures for county governments, it would be unfair for taxpayers to have to pay to defend worthless lawsuits or to pay for litigation initiated solely to elicit more money from them. Also, while not likely in every county or circumstance, increased litigation could serve to limit the public dollars available for performing mandatory duties and providing other important county services, especially in some of the less populous counties with smaller operating budgets. While it is certainly important for wronged parties with legitimate claims to be able to secure competent counsel, allowing the district court's lowered standard to stand would only encourage *meritless* suits. In turn, such litigation stands to harm taxpayers and does nothing for the legitimate civil rights plaintiff. Clearly, excessive litigation should not be incentivized with a low threshold for the award of fee enhancements.

In addition to financial burdens caused by unnecessary litigation, there could also be significant administrative consequences for counties. In Georgia, much of the administration of the superior court system is financed by the counties in which they sit. O.C.G.A. § 15-6-24; 1983 Ga. Const., Art. VI Sec. VII Para. V. The administration of the court system is a significant expense and typically represents approximately eight percent of counties' budgets according to county budget information derived from the Georgia Department of Community Affairs.

As such, court systems in many Georgia counties are already stretched to their limits. Any increase in

litigation could require counties to endure additional administrative costs to accommodate the new litigation, such as new staff or more office space. Unnecessary pressures on county court systems should be avoided, and any incentive for additional or extended litigation due to the expanded potential for enhancements should not be endorsed by this Court.

CONCLUSION

Affirmation of the United States Court of Appeals' decision to allow an enhancement of respondents' attorneys' fees beyond the lodestar amount merely because counsel does a good job or gets favorable results will have a number of unintended and harmful consequences. Not only will such a holding set a dangerous precedent by encouraging meritless and unnecessary satellite litigation, but, more importantly, it will likely result in taking additional money unnecessarily out of the pockets of taxpayers to pay for litigation expenses and perhaps inflated attorneys' fees. Further, allowing district courts such broad discretion in awarding attorneys' fees will result in widely disparate results that will undermine the integrity of government and the judicial system.

As a matter of public policy, *Amicus* asserts that, ultimately, claimants and the public are best protected by authorizing enhanced attorneys' fees only in truly rare and exceptional circumstances and by establishing a bright line for the award of enhanced

fees. Doing so would mitigate the negative effects of the above described peripheral consequences. Because such a holding would be entirely consistent with prior opinions of this Court, *Amicus* respectively requests this Court to overrule the holding of the Eleventh Circuit Court of Appeals in this case and remand to the district court so that appropriate attorneys' fees consistent with this Court's order may be awarded.

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AMICUS CURIAE BRIEF

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SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF GEORGIA, *et al.*,
Petitioners,

v.

KENNY A. by HIS NEXT FRIEND LINDA WYNN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amici curiae are faculty members at Howard University School of Law and Student Attorneys of the Civil Rights Clinic at the Law School.[1] The Civil

[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of the brief. The written consent of the parties accompanies this brief.

Rights Clinic at Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness and political equality. The Clinic provides *pro bono* services to indigent, prisoner, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, habeas corpus, and unfair procedural barriers to the courts. Like many such public-interest law school clinics around the country, the Civil Rights Clinic typically initiates cases that, due to their extraordinarily long-time commitments, novel constitutional arguments, and lack of direct financial remuneration, the private bar is unable or unwilling to litigate.

We submit this brief in support of Respondents in order to respectfully urge this Honorable Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit, holding that federal district courts have the discretion to use such legitimate factors as quality of performance and results obtained to properly enhance the lodestar calculation of attorney fee awards under federal fee-shifting statutes.

SUMMARY OF ARGUMENT

Lawyers who undertake public interest work often do so in the face of difficult constitutional precedent, limited financial resources, unremitting government opposition, and public attention verging from lukewarm apathy to outright hostility. But when, as in *Kenny A. v. Perdue*, these advocates prevail, their work benefits not just their named clients, not just the members of the plaintiff class, and not even just the larger community, but also future generations of

children who, as a result of the litigation may yet grow up safe from abuse and neglect, and free of fear and pain.

LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991), a case pending before the Honorable Thomas F. Hogan in the U.S. District Court for the District of Columbia, not only exemplifies the skill, diligence, and perseverance required by plaintiffs' counsel bringing successful child welfare reform cases, but also underscores the remarkable outcomes that can be achieved as a result. Amici write here to apprise the Court of the following: (I) the *LaShawn A.* action was brought because children in foster care in the District of Columbia were being harmed by the District's child welfare system; (II) the federal court's decision in *LaShawn A.* has led to a major overhaul of the District's foster care system and a marked improvement in the lives of children living in the District; and (III) child welfare reform cases, such as *Kenny A., LaShawn A. and others*, are hard-won, but are critical to securing the civil rights of abused and neglected children and keeping them safe from harm. In summary, this brief demonstrates that such cases are extremely complex and difficult, requiring specialized, experienced and skillful attorneys, but they can achieve transformative results. In order to properly encourage such skillful attorneys to take on these critical cases, courts must ensure that they are fully compensated for their work.

The direct issue before the Court today may be whether the award of attorneys' fees under a federal fee-shifting statute may be adjusted upward from the lodestar based on quality of performance and results obtained. But at the end of the day, the inescapable question both *Kenny A.* and *LaShawn A.* also raise

comes to this: Do we value the work public interest lawyers do in the name of children who may never be able to express, much less understand, the ways in which rarefied constitutional arguments translate into food, shelter, and care? "What is honored in a country," James Baldwin once wrote, "is cultivated there."[2] Given the great need for public interest lawyering in general and child welfare advocacy in particular, upholding the district court's discretion to apply an upward adjustment to the lodestar calculation of an attorney-fee award based on quality of performance and results obtained would seem to be nothing less than the cultivation of the professional ideals of public service we profess to honor.

ARGUMENT

I. PRIOR TO THE LITIGATION IN *LASHAWN A. V. DIXON* AND THE RESULTING DECISION BY THE HONORABLE THOMAS F. HOGAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, THE DISTRICT'S FOSTER CARE SYSTEM WAS IN SHAMBLES AND IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF FOSTER CHILDREN

A. The *Lashawn A.* Litigation Was Filed On Behalf of the District's Foster Care Children Because They Were Being Harmed by the Child Welfare System Charged with Protecting Them

In 1989, the American Civil Liberties Union's Children's Rights Project initiated an action in the U.S. District Court for the District of Columbia,

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[2] James Baldwin, *In Search of a Majority*, *in The Price of the Ticket* 231 (1985).

challenging unconstitutional violations in the foster care system of the District of Columbia. The action, titled *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991), was brought on behalf of a four-year old girl named LaShawn A. and six other foster children who had been neglected or abused both by their families and by the social system charged with protecting them. Complaint at 43, *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (No. 89CV1754). Space and scope prevent us from fully detailing the stories of the *LaShawn* children and the neglect the District visited upon them, but a brief recitation of the experiences of two of these children helps to illustrate the complex and difficult work the *LaShawn* attorneys, like their *Kenny A.* counterparts, undertake when they seek to litigate on behalf of abused and neglected children.

Plaintiff LaShawn had entered the District's custody at two-and-one-half years old when, as a "special-needs child," she was voluntarily placed in custody by her homeless mother. *LaShawn A.*, 762 F. Supp. at 983. LaShawn stayed in temporary "emergency custody" with an elderly foster mother, *Id.*, for two and one-half years. Complaint, *supra* at 44. In all that time, even though Child and Family Services Division's (CFSD) planning goal was to reunite LaShawn with her biological parent, the District offered no services to her mother to address the neglect that initially justified LaShawn's custody. *Id.* at 46. In June 1987, a psychiatrist who examined LaShawn identified potential developmental and psychiatric/psychological problems and recommended that LaShawn receive complete assessments. It took the Department one and one-half years to arrange these assessments. *Id.* at 48. A psychiatric evaluation conducted in May 1989 indicated that LaShawn may

have experienced an overuse of physical punishment and possibly even sexual abuse in her foster home. *LaShawn A.*, 762 F. Supp. at 983. At trial, child psychiatrist Dr. Harold Eist reported that six year-old LaShawn was likely to suffer from multiple future bouts of depression, and concluded that the longer that LaShawn remained with the current foster mother, the less she would be able to benefit from adoptive placement. *Id.* Nonetheless, LaShawn remained in this foster home at the time of trial. *Id.* In 1990, prodded into action by the pending lawsuit, the District finally rushed LaShawn into a new foster home, where she was ultimately adopted. Toni Locy, *Girl in Foster Care Suit Learns What Love Is*, Wash. Post, Oct. 3, 1994, at A7. She arrived at her adoptive home looking malnourished and unable to articulate when she felt sick. *Id.* Four years later, she was still in special education. *Id.*

Plaintiff Demerick B., like LaShawn A., spent years in short-term emergency placement, entering the custody of the District's Department of Health and Human Services (DHS) in 1986, when he was only eleven months old. Complaint, *supra* at 105. Demerick was initially placed at St. Ann's Infant and Maternity Home ("St. Ann's), a restrictive, short-term, emergency care facility in Maryland. *Id.* at 52. After four months, St. Ann's began repeatedly warning DHS that Demerick should be moved to a foster home. *Id.* In December 1988, St. Ann's wrote: "Demerick is suffering emotionally and developmentally because of his prolonged institutionalization. He needs to be moved to a home setting as soon as possible to prevent further emotional damage." *Id.* Nonetheless, Demerick remained at St. Ann's for at least three years. *Id.* at 53. During the crucial developmental years between infancy and primary school,

Demerick was denied the opportunity to develop a continuous and affectionate relationship with a single adult. *LaShawn A.*, 762 F. Supp. at 971. He was not visited once by either his mother or the DHS worker responsible for his care. *Id.* Late in 1988, Demerick was referred to the DHS' adoption unit but, by the time trial began, DHS had done little to facilitate Demerick's adoption. Complaint, *supra* at 54-55.

B. By the Time of *LaShawn A.*, the Foster Care System was Systematically and Routinely Failing The Thousands of Children Who Depended on the District for Food, Shelter and Basic Care

By the time that Federal District Judge Thomas F. Hogan decided LaShawn A. in 1991, the District of Columbia's child welfare system was in shambles. From its management and infrastructure, to its services for children and families, to its placement of children, the system was failing the thousands of children who depended on the District for food, shelter, and basic care. *LaShawn A.*, 762 F. Supp. at 960.

As part of DHS, CFSD's five divisions were responsible for the bulk of the District's child welfare services. *Id.* at 968. In his findings of fact, Judge Hogan determined that all five branches of CFSD had failed to fulfill their statutory and professional duties. *Id.* at 997 n.30. Specifically, Judge Hogan found that the District had breached its constitutional and statutory duties[3] to perform abuse and

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[3] At the time of the *LaShawn* litigation, both Federal and District law required child welfare services to meet minimal benchmarks. *See LaShawn A.* 762 F. Supp. at 960.

neglect investigations, to provide preventive services and continuing services, to monitor foster homes and institutions, and to properly manage its budgetary constraints. *Id.* at 968-69. In his opinion, Judge Hogan laid bare the District's breaches of professional and legal standards, including overwhelming caseloads, inadequate supervision, and insufficient staff training. *Id.* at 977-79.[4]

As a result, the District had failed to prioritize enabling a child to remain or return home when possible. *Id.* at 970 (citing 42 U.S.C. § 5106a(b)(2), (b)(3); D.C. Code Ann. § 6-2105, 6-2124). Even though CFSD was authorized to provide services such as emergency financial aid, shelter, emergency caretaker services, home-maker services, day care, counseling, and medical services, *Id.* (quoting D.C. Code Ann. § 6-2124), at trial, social workers and the former chief of Intake and Crisis Services confirmed that these services frequently were not provided. *Id.* at 970. With the District's foster system in chaos, the District resorted to misusing emergency short-term care so dramatically that children often disappeared into short-term solutions for years, deprived of the protections of federal law and denied opportunities to be either returned to their parents or freed for possi-

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[4] Then-Acting Chief of CFSD Evelyn Andrews reported to the Family Services Administration (FSA) in November 1988: "Staff shortages in the critical area of protecting children has required supervisors to take uncovered caseloads, staff to cover for coworkers who are in the field or on leave (there has been a significa it increase in absenteeism), staff to attempt to fulfill the demands made through court orders, and make every effort to comply with mandated timeframes. It is virtually impossible to protect children in such environment and under current conditions. *Children are at risk.*" *LaShawn A.*, 762 F. Supp. at 969 (emphasis in original).

ble adoption. *Id.* at 971. Thus, between October 1, 1987 and September 30, 1988, nearly 75% of children in voluntary placement had been in this temporary status for longer than 90 days. *Id.*[5]

Meanwhile, CFSD's information system was so outdated that it did not identify all children in the District's foster care custody and could not locate all the children placed. *Id.* at 976[6]. Caseworkers resorted to tracking this crucial information on index cards. *Id.* No budget money was allocated for upgrading this system, and since the office that managed the tracking did not have an official status in DHS, the Department was not eligible for Federal funds that could have otherwise covered 90% of its costs. *Id.* at 976-77.

CFSD conceded many of Judge Hogan's findings, but argued that financial constraints were mainly responsible for these lapses. *Id.* at 997. Judge Hogan found these arguments unpersuasive in part because the District's own mismanagement had caused it. In 1980, Congress had enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA) in order to create incentives for states to de-emphasize foster

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[5] Many children in emergency care were ultimately returned to their families after these months or years in custody with no evidence that their formerly abusive and neglectful homes had improved. Complaint at ¶ 105, *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (No. 89CV1754). In a vicious cycle, these young children then often returned to foster care after suffering additional psychological and physical harm. *Id.*

[6] This was in direct violation of federal law, which requires that child welfare agencies receiving federal funds maintain an information system from which status, location, and goals for placement of all foster children may be determined. *LaShawn A. v.* Dixon, 762 F. Supp. at 976 (citing 42 U.S.C. § 627(a)(2)(A)).

care and promote efforts to find children permanent placements with either their biological or adoptive families. Karoline S. Homer, *Program Abuse in Foster Case: A Search for Solutions*, 1 Va. J. Soc. Pol'y & L. 177, 177 (1993) (citing S. Rep. No. 336, 96th Cong., 2d Sess. 11 (1980), *reprinted* in 1980 U.S.C.C.A.N. 1448, 1460). The District failed to follow protocols and maintain records that would have made it eligible for major increases in Federal funding under the AACWA. *LaShawn A.*, 762 F. Supp. at 980. While at least 75% of children in the District's care would have been eligible under AACWA's guidelines, CFSD established eligibility for less than 25% of children in care in both 1987 and 1988. *Id.* In 1985 and 1986, the U.S. Department of Health and Human Services (HHS) disallowed 76% of the District's claim for $7.8 million in reimbursements under the Act. *Id.* at 981. HHS reported that this high rate of disallowance was based on the District's noncompliance with both federal regulations and CFSD policies. In sum, the Center for the Study of Social Policy estimated that the District could have obtained at least an additional *$21 million* in federal reimbursements by complying with relevant procedures.[7] That unused $21 million was available to the District to pay salaries, finance considerable infrastructure improvements,

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[7] The District also failed to maximize potential federal funds from the Social Security Act Titles IV-A (Emergency Assistance), IV-E (Child Welfare and Adoption Assistance), and XIX (Medicaid), which could conservatively total an extra $7 million in funding for the District. *Hearing Before the H. Comm. on the District of Columbia on Implementation of LaShawn A. v. Kelly*, 103rd Cong. (1994) (testimony of Judith W. Meltzer, Senior Associate, The Center for the Study of Social Policy); *LaShawn A.*, 762 F. Supp. at 981.

and generally improve the quality of foster children's care.

II. JUDGE HOGAN'S DECISION IN *LASHAWN A.*, HAS MARKEDLY IMPROVED THE LIVES OF THE DISTRICT'S FOSTERS CARE CHILDREN

As Judge Hogan heard *LaShawn A.*, Federal courts, including the Second, Fourth, Sixth, Seventh, and Eleventh Circuits, issued decisions protecting the constitutional rights of foster children. *See Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 145 (2d Cir. 1981); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988); *K.H. v. Morgan*, 914 F.2d 846, 850 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990).[8]

Judge Hogan issued a 102-page opinion declaring his "inescapable conclusion" that the foster care system operated by the District did not comply with federal law, District law, or the United States Constitution. *LaShawn* at 960.[9] He appointed the Center for the Study of Social Policy to monitor the CFSD. Together, the city, the monitor, and Children's Rights authored a Remedial Order, which set timelines and deliverables for CFSD's progress. Shimica Gaskins, *Is it Possible to Reform a Child Welfare System? An Evaluation of the Current Progress in the District of Columbia and the Advocacy Strategies that Led to*

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[8] *See also* Arlene E. Fried, *The Foster Child's Avenues of Redress: Questions Left Unanswered*, 26 Colum. J.L. & Soc. Probs. 465, 480 (1993)

[9] Judge Hogan wrote: "The Court views the evidence in this case as nothing less than outrageous. The District's dereliction of its responsibilities to the children in its custody is a travesty." *LaShawn* at 998.

Reform, 5 Whittier J. of Child & Family Advocacy 165, 170 (2005). Early improvements under the Remedial Order proved modest at best. Gaskins, *supra* at 170. Court-appointed monitor Judith Meltzer noted that the District was initially noncompliant "in almost every area of the remedial order," including many of the serious problem areas exposed at trial. *Reforming the Adoption and Foster Care System in the District of Columbia: Hearing Before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia of the S. Comm. on Governmental Affairs*, 105th Cong. 36 (1998) [hereinafter 1998 Hearing] (testimony of Judith Meltzer, Senior Associate, Center for the Study of Social Policy.) By October 1994, Judge Hogan determined that "defendants were totally out of compliance with the Remedial Order and Revised Implementation Plan in the areas of Resource Development and Corrective Action." *LaShawn A. v. Kelly*, 887 F. Supp. 297 at 299 (D.D.C. 1995). Consequently, Judge Hogan initially put the District into a limited receivership and later determined that a full receivership was required. *Id.*

Receivership gave the District's foster-care system some much-needed attention. With the receiver, Judge Hogan, the court-appointed monitor, and Children's Rights focusing scrutiny on the District's child welfare services, the District government passed the Child and Family Services Establishment Amendment Act of 2000. Gaskins, *supra* at 170 (citing D.C. Stat. 13-277 (2001)). This Act established Child and Family Services as a cabinet-level agency, separating it from the District's Department of Health and Human Services. *Id.* at 170. This independence gave the District's Child and Family Services (now called Child and Family Services

Agency, or CFSA) direct control over child welfare matters. *Id.* Changes included consolidation of jurisdiction over neglect and abuse cases. *Id.* Furthermore, Child and Family Services was given control of its own personnel matters, allowing the agency to procure needed staff quickly. *Id.*

In 2001, the District having achieved significant improvements,[10] Children's Rights, the court-appointed monitor, and the District collaborated on plans to return control of the child welfare services to the District, *Id.*, a process that was successfully completed in 2001 with the establishment of the Child and Family Services Agency. *Hearing Before the Subcomm. on the District of Columbia of the S. Comm. on Appropriations*, 108th Cong. (2003) [hereafter 2003 Hearing] (testimony of Judith W. Meltzer, Deputy Director, Center for the Study of Social Policy).

The plans to turn over management of foster care back to the District contemplated full compliance with the Court's 1993 order by December 2006. Gaskins, *supra* at 170. During a probationary period, which ran until January 7, 2003, the District met performance targets for 75% of agreed-upon standards designed as incremental measures of progress. *See 2003 Hearing*. Although this did not indicate either that the District's child welfare system was functioning consistently and acceptably or that it had achieved compliance with the *LaShawn* order, it

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[10] *See Termination of the LaShawn Receivership and the Status of the District of Columbia Child and Family Services Agency: Hearing Before the Subcomm. on the District of Columbia of the S. Comm. on Appropriations*, 107th Cong. (2001) (testimony of Judith Meltzer, Deputy Director, Center for the Study of Social Policy).

reflected "real improvement in the system." *Id.* Furthermore, the District's adherence to the implementation plan led to a dramatic increase in federal reimbursement for foster care services, from eight million dollars in 1992 to forty million dollars in 1998. Gaskins, *supra* at 170.

As of August 2009, *LaShawn* remains a regular fixture in Judge Hogan's courtroom. Full compliance has not yet been achieved. However its foster care system has been transformed. As a stand-alone agency, CFSA's budget is double what it was in 1995.[11] The agency has greatly increased its casework staff, improved their staff's qualification, and dramatically decreased average caseloads.[12] Other innovations include family-involved meetings to assess permanency planning for children, new family preservation programs, and a revamped hotline.[13] With functioning computer systems, CFSA can now quickly locate all children in its care.[14] In a January 2009 report to Judge Hogan, court-appointed monitor Judith Meltzer wrote that "the District should be commended for the success of its work,"[15] concluding that "[t]he ability of the Child and Family Services Agency, with support from the Executive Office of the Mayor, the City Administrator, and the Attorney

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[11] *LaShawn A. v. Fenty* Fact Sheet (2009), http://www.childrensrights.org/wp-content/uploads//2009/01/2009-01-21_dc_case_fact_sheet.pdf.

[12] *Id*

[13] *Id.*

[14] *Id.*

[15] Letter and Report from Judith Meltzer, Deputy Director, Center for the Study of Social Policy, to The Honorable Thomas F. Hogan (Jan. 5, 2009), http://www.cssp.org/whatsnew.html (last visited Aug. 27, 2009).

General to effectively implement the stipulation agreements has created an opportunity to move forward again to achieve the goals of child welfare reform which are at the heart of the *LaShawn* decree."[16]

In sum, twenty years after the litigation fist begun, *LaShawn A.* has made a significant difference in the lives of foster children in the District. With the public attention the case has brought to bear upon the system, the case serves as both inspiration for children's welfare attorneys, and as evidence of the long, tortuous, and difficult path these attorneys have to walk in order to prevail in these cases.

III. Because Foster Care Abuses Remain A Nationwide Epidemic, There is a Great Need To Provide Resources and Incentives for Public Interest Lawyers to Work on Behalf of the Nation's Foster Care Children

A. Abuses of Children in Foster Care Remain a Critical Problem Nationwide.

While *LaShawn* is a particularly dramatic example of the dysfunctions of a foster care agency, the District's failings are by no means unique. Gerard Wallace, *Foster Care Plus Love*, Wash. Post, June 9, 2004, at A21.[17] Nationwide, children in foster care are often shuffled from home to home over the course of many years, so they are unable to form lasting

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[16] *Id.*

[17] *See also* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. C.R.-C.L. L. Rev. 199, 209 (1988).

bonds with any adult. *See* Mushlin, *supra* at 208.[18] They often do not receive proper medical or psychiatric attention;[19] however, it is common for foster parents to seek medication to control foster children more easily. Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 Cardozo Pub. L. Pol'y & Ethics J. 131, 160 (2003). A grand jury in San Diego found a large disparity between the care of foster children, and that of biological children; the foster children were given cheaper food and clothing, restricted to certain areas of the house, and sometimes forbidden to open the refrigerator or watch television with the family. *Id.* Most concerning, however, is the fact that children in foster care are physically abused at a much greater rate than children in the general population.

No one knows exactly how many children in foster care are being abused or neglected, but scholars who have studied the issue reason that a large number of such cases go unreported. Mushlin, *supra*, at 205. A study conducted between 1986 and 1990 by the National Foster Care Education Project found that the incidence of child abuse for children in foster care was more than ten times greater than in the general population. *Id.* at 206. Foster children are also more susceptible to sexual abuse because, as a practical matter, inhibition to incest does not apply within the foster family structure. *Id.* at 205. Accordingly, the

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[18] Program abuse is another form of mistreatment common to foster care. It occurs when the agency fails to provide children with a stable home environment or provide for medical and developmental needs. *Id.* at 207.

[19] *See* Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 Md. J. Contemp. Legal Issues 1, 7 (1995).

rate of substantiated allegations of sexual abuse is four times higher for children in foster care than children in the general population. *See* Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. Rev. L. & Soc. Change 1, 7 (1999). When accounting for the many cases of abuse and neglect that go unreported, one author reasoned that forty-three percent of all foster children were in unsuitable foster homes and fifty-seven percent were at risk of harm in foster care. Mushlin, *supra*, at 207. In part as a result of the neglect and abuse they suffer in foster care, an estimated forty percent of foster children end up on welfare or in prison, and foster children are 67 times more likely to be arrested than children who did not grow up in foster care. Chaifetz, *supra*, at 8.

B. There Remains a Great Need for Public-Interest Lawyers in Collaboration with Members of the Private Bar Willing to Work on Behalf of the Nation's Foster Care Children

Litigation is a "blunt instrument."[20] Yet, this "blunt instrument" is often required to rescue children from the abuse and neglect of the very system charged with protecting them.[21] Litigation brings public awareness to the issues plaguing the child welfare system.[22] It also creates judicial oversight,

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[20] Children's Rights Organization, Winning for Children: Using the Courts to Reform Child Welfare 1, http://data.opi.state.mt.us/legbills/2005/Minutes/House/Exhibits/jhh25a110.PDF (last visited Aug. 5, 2009).

[21] *Id.*

[22] *Id.*

uses the fact gathering processes of the courts, prompts increased financial resources, and brings together the expertise needed to implement results.[23] *See generally* Child Welfare League of America, Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005 (2005). In the last fifteen years, Children's Rights and other child advocacy organizations have brought child welfare class action litigation in 32 states. *Id.* at 2. While progress has been slow, these lawsuits have often resulted in meaningful settlement agreements and significant court-approved consent decrees. *Id.*

In addition to *Kenny A.* and *LaShawn A.* examples from four other states also help to demonstrate some of the discrete ways in which litigation has been the catalyst in reforming child welfare systems across the country, as well as the long and arduous task lawyers face when they initiate litigation in the fight for children's rights.

On November 15, 1988, a class action lawsuit was filed against the Alabama Department of Human Resources (DHR) on behalf of a minor known as R.C. *R.C. v. Walley*, 390 F. Supp. 2d 1030, 1032 (M.D. Ala. 2005). The suit, which was filed when R.C. was an eight-year-old boy, *Id.*, alleged that "DHR failed to maintain systems to ensure emotionally disturbed or behaviorally disordered foster children were adequately provided for when placed in the foster system."[24] Paradoxically, R.C., who himself had been abused by his mother and later neglected by his

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[23] *Id.*

[24] Alabama Department of Human Resources, R.C. Consent Decree, http://www.dhr.state.al.us/page.asp?pageid=245 (last visited Aug. 20, 2009).

father, was ultimately placed in the custody of DHR where he was subjected to "a series of short term placements, including confinement in psychiatric hospitals." *R.C.*, 390 F. Supp. 2d at 1032. Accordingly, R.C.'s counsel claimed that child welfare authorities failed to provide appropriate treatment to R.C. and were to blame for his deteriorated condition. Child Welfare League of America, *supra* at 33. Through this civil action, R.C. sought to rectify the systemic deficiencies within DHR's child welfare system, which allegedly affected numerous other children under its care. *R.C.*, 390 F. Supp. 2d at 1032.

Two years after the lawsuit was filed-thanks to the vigilant effort of R.C.'s attorneys-the parties reached a settlement in the form of a consent decree, thus averting a protracted season of litigation. *Id.* This case is particularly noteworthy because despite the fact that DHR acknowledged that a trial would have resulted in "a clear victory for the plaintiffs" and exposed "devastating" facts, *Id.*, it took attorneys who were willing to sacrifice their time, energy, and resources to effectuate real change. To this end, the settlement "prompted statewide reform of the child welfare system, implementing a unique collaborative county-by-county model and dramatically improving the care of children in foster care and reducing their time in the system."[25] To this day, the initials "R.C." remain synonymous with this Consent Decree, which has been the catalyst for the overhaul of DHR's child welfare system. *R.C.*, 390 F. Supp. 2d at 1032.

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[25] Child Welfare League of America, *supra* note 150, at 33 (citing Bazelon Center for Mental Health Law, Making Child Welfare Work, http://www.bazelon.org/issues/children/publications/rc/index.htm (last visited Aug. 20, 2009)).

On the heels of the settlement reached in Alabama, attorneys in the state of Arkansas took up the cause for children in custody of Arkansas' Department of Human Services (DHS).[26] In *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993), plaintiffs filed a 93-page complaint asserting, among other things, that "DHS and its Division of Children and Family Services (DCFS) have failed to investigate complaints of abuse and neglect, to make reasonable efforts to keep families together, to provide adequate care to children placed in foster homes, and to properly train foster parents." *Id.* at 322. After the court certified the class by stipulation on October 10, 1991, *Id.*, the parties engaged in settlement negotiations through January of 1992, which resulted in a "lengthy and comprehensive consent decree. *Id.*

The Consent Decree, referred to as the "Arkansas Child Welfare Reform Document," required "substantial increases in foster care board rates and in the number of therapeutic foster homes, initial health screenings of all foster children within 72 hours, maximum caseload standards of 15 for abuse/neglect investigations, in home family services cases, out of home placement cases, statewide availability of basic prevention and reunification services by January 1993, and initiation of all child abuse/neglect investigations within 72 hours (24 for extreme cases)." Child Welfare League of America, *supra* at 34.

Although the district court entered final approval of the consent decree in April 1992, the state appealed to the Eighth Circuit, contesting the district

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[26] *See* National Center for Youth Law, *Angela R. v. Huckabee*, http://www.youthlaw.org/publications/fc_docket/alpha/angelarvhuckabee/ (last visited Aug. 23, 2009).

court's denial of their motion to narrow the plaintiff class.[27] As a result, on July 13, 1993, the Eighth Circuit issued a ruling, which rejected the state's jurisdictional challenge, but vacated the consent decree and remanded the case to the district court due to perceived ambiguity in the enforcement provisions of the decree. *Angela R.*, 999 F.2d at 326.

Using their newfound leverage, the state refused to negotiate a reinstatement of the settlement.[28] The plaintiffs then sought relief from the district court in an attempt to resolve the ambiguity found by the Eighth Circuit, but instead suffered an additional defeat when on March 30, 1994 the district court denied their motion and scheduled the trial to commence on October 17, 1994.[29] However, less than three weeks before trial—thanks to the perseverance of the plaintiffs' counsel—the defendants agreed to engage in settlement negotiations.[30] As a result of their efforts, the plaintiffs' counsel was able to finally have the Consent Decree established in 1994 and later renewed in 1999 and 2001. Child Welfare League of America, *supra* at 34.

Finally, in 2001, the Consent Decree expired, marking an end to nearly 10 years of reform efforts. *Id.* Despite the expiration of the Consent Decree, "DCFS still makes quarterly presentations to the executive and legislative branches concerning its service maintenance, and an advisory committee monitoring DCFS also meets quarterly." *Id.*

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

Yet another case that evinces the importance of creating incentives for the legal community to fight for children's rights is that of *Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006). Originally filed in federal district court in July 2002, the suit alleged that children with mental health needs within the custody of the Los Angeles County Department of Children and Family Services ("DCFS") were not being provided with adequate mental health services including wraparound services[31] and therapeutic foster care[32]. *Katie A.*, 433 F. Supp. 2d at 1067.

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[31] Wraparound services are defined in Welfare and Institutions Code § 18251(d) as 'community-based intervention services that emphasize the strengths of the child and family and includes delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives.' Providers of wraparound care services: (a) engage in a unique assessment and treatment planning process that is characterized by the formation of a child, family, and multi-agency team (b) marshal community and natural supports through intensive care management and (c) make available an array of therapeutic interventions, which may include behavioral support services, crisis planning and intervention, parent coaching and education, mobile therapy, and medication monitoring." National Center for Youth Law, *Katie A. v. Bontá: An Overview – Plaintiffs' Definition of Wraparound Services (Appendix A)*, http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Katie_A.2/Katie_A_-_Appendix_A.pdf (last visited Aug. 23, 2009).

[32] "Therapeutic foster care is an intensive, individualized mental health service provided to a child in a family setting, utilizing specially trained and intensively supervised foster parents. Therapeutic foster care programs: (a) place a child singly, or at most in pairs, with a foster parent who is carefully selected, trained, and supervised and matched with the child's needs; (b) create through a team approach, an individualized treatment plan that builds on the child's strengths; (c) empower the therapeutic foster parent to act as a central agent in implementing the child's treatment plan; (d) provide intensive

"According to the complaint, children identified as having emotional or behavioral impairments were receiving few services and placed in multiple foster homes, many ending up in institutions due to their worsened conditions." Child Welfare League of America, *supra* at 35.

Due to the tireless efforts of plaintiffs' counsel, L.A. County entered into negotiations and settled in March of 2003, agreeing to implement a bevy of changes in its foster care system.[33] More specifically, the settlement agreement required the county to close its 150-bed MacLaren Children's Center, and to offer "intensive, comprehensive and specialized care to children with mental, behavioral, or emotional disorders." Child Welfare League of America, *supra* at 35. Additionally, the settlement-affecting approximately 30,000 children-required the county to comply with "several standards concerning assessment, service provision and accountability practices of the agency." *Id.* Moreover, an advisory panel has been installed to help monitor the county's imple-

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oversight of the child's treatment, often through daily contact with the foster parent; (e) make available an array of therapeutic interventions to the child, the child's family, and the foster family (interventions may include behavioral support services for the child, crisis planning and intervention, coaching and education for the foster parent and the child's family, mobile therapy for the child and the child's family, and medication monitoring); and (f) enable the child to successfully transition from therapeutic foster care to placement with the child's family or alternative placement by continuing to provide therapeutic interventions." National Center for Youth Law, *Katie A. v. Bontá: An Overview – Plaintiffs' Definition of Therapeutic Foster Care (Appendix B)*, http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Katie_A.2/Katie_A_-_Appendix_B.pdf (last visited Aug. 23, 2009).

[33] *Id.*

mentation of the terms of the agreement. *Id.* The oversight of this panel has already proven to be critical: a report finding the county out of compliance with the agreement was filed on September 9, 2005.[34] While the plaintiffs have since met with the county and county stakeholders regarding various compliance concerns, the state agencies did not participate in the settlement and litigation against them continues to be ongoing.[35]

Marisol v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) also reflects an arduous, but successful battle for reform of a child welfare system. *Marisol* was a class action lawsuit filed by eleven abused and neglected children on behalf of over 100,000 children under the jurisdiction of the New York State Office of Children and Family Services (OCFS) and in custody of the New York City Administration for Children's Services ("ACS"). *Id.* at 669. When the lawsuit was filed, "New York operated one of the worst systems in the nation, resulting in the deaths of multiple children and causing irreparable physical and mental harm to thousands more."[36] The suit alleged, among other things, that ACS failed to: "(1) appropriately accept reports of abuse and neglect for investigation; (2) investigate those reports in the time and manner

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[34] Bazelon Center for Mental Health Law, *Court Asked to End California's Denial of Services to Foster Children*, http://www.bazelon.org/incourt/docket/katieA.htm (last visited Aug. 23, 2009).

[35] National Center for Youth Law, *Katie A. v. Bontá: An Overview*, http://www.youthlaw.org/litigation/ncyl_cases/child_welfare/00/ (last visited Aug. 23, 2009).

[36] Children's Rights, New York (*Marisol A. v. Giuliani*), http://www.childrensrights.org/reform-campaigns/legal-cases/new-york-marisol-v-giuliani/ (last visited Aug. 23, 2009).

required by law; (3) provide mandated pre-placement preventive services to enable children to remain at home whenever possible; (4) provide the least restrictive, most family-like placement to meet children's individual needs; 5) provide services to ensure that children do not deteriorate physically, psychologically, educationally, or otherwise in [ACS] custody; . . . (11) provide caseworkers with training, support, or supervision; and (12) maintain adequate systems to monitor, track, and plan for children." *Id.* at 672.

In June 1996, the court certified the plaintiff class, and on September 26, 1997, the Second Circuit affirmed the district court's certification of the plaintiff class.[37] Once again, the relentless efforts of the plaintiffs' counsel proved decisive, and in July 1998, the parties began settlement negotiations, resulting in historic settlement agreements with the state and city in 1999. Child Welfare League of America, *supra* at 46. The settlement with the state required New York to implement a computerized data management system and to engage in oversight responsibilities over the city's child welfare system.[38] While the state's failure to adequately develop its computer system resulted in further legal action in 2001, counsel for the plaintiffs, unwavering in their commitment to justice, continue to monitor the state's compliance with the remaining provisions of the settlement

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[37] National Center for Youth Law, *Marisol v. Pataki*, http://www.youthlaw.org/publications/fc_docket/alpha/marisolvpataki/ (last visited Aug. 23, 2009).

[38] Children's Rights, New York (*Marisol A. v. Giuliani*), http://www.childrensrights.org/reform-campaigns/legal-cases/new-york-marisol-v-giuliani/ (last visited Aug. 23, 2009).

agreement pertaining to the data management system.[39]

As the above cases show, lawyers who work on behalf of foster care children can and do change their lives for the better. But the work is neither easy nor complete, but instead requires years of effort, commitment, determination and passion. For all of the extraordinary results that have been achieved so far in cases such as *Kenny A.*, much more work remains to be done. It is now for us to provide the resources and incentives that will attract and reward the legal community to continue the fight for children's rights.

CONCLUSION

For the foregoing reasons, we pray the Court uphold the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[39] *Id.* The settlement with the city also yielded such improvements as the creation of an advisory panel, lower caseloads, funding for additional placement, significant increases in staff training, improved data management systems, and reconfigured foster care services along neighborhood lines. Child Welfare League of America, *supra* at 46.

APPENDIX

APPENDIX

List of *Amici*

The following Howard University School of Law Professors participate as *amici*:

Derek W. Black, Associate Professor of Law

Lisa A. Crooms, Professor of Law

Okianer Christian Dark, Associate Dean and Professor of Law

Andrew I. Gavil, Professor of Law

Brian Gilmore, Supervising Attorney, Fair Housing Clinic

Alice Gresham, Professor of Law

Homer C. LaRue, Professor of Law

Warner Lawson, Jr., Professor of Law

Cynthia R. Mabry, Professor of Law

Lawrence C. Nolan, Professor of Law

Claire Raj, Director Equal Justice Project

Reginald L. Robinson, Professor of Law

Patrice Simms, Assistant Professor of Law

Frank H. Wu, Professor of Law

AMICUS CURIAE BRIEF

No. 08-970

In The Supreme Court of the United States

SONNY PERDUE, GOVERNOR OF GEORGIA, ET AL., PETITIONERS

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR LAW AND ECONOMICS SCHOLARS LUCIAN A. BEBCHUK, ALBERT CHOI, ANDREW F. DAUGHETY, JOHN J. DONOHUE III, THEODORE EISENBERG, BRUCE L. HAY, AVERY W. KATZ, HERBERT M. KRITZER, JENNIFER F. REINGANUM, AND KATHRYN SPIER AS AMICI CURIAE SUPPORTING RESPONDENTS

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AUGUST 28, 2009

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors who teach and write on law and economics, with particular scholarly interests in the economics of litigation and the economics of the attorney-client relationship. Amici are concerned that the rule advocated by petitioners will, at least in some cases, preclude the appropriate determination of the "reasonable attorney's fee" permitted by 42 U.S.C. § 1988(b). Because the conventional "rates times hours" calculation does not necessarily take sufficient account of the actual quality of performance or result, permitting consideration of those factors, in appropriate cases, will further the purpose of Section 1988. It will provide incentives for the lawyers best suited to represent clients in civil rights cases to take those cases, will encourage lawyers to focus on results, and will discourage inefficient expenditures of time.

Amici do not take a position on when such enhancements are appropriate or what kind of evidence should be required to justify an enhancement.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

Indeed, some amici scholars believe that the circumstances warranting such an enhancement may be infrequent. But amici are unified in the belief that there should not be a categorical prohibition on enhancements for the quality of performance or result.

The amici law and economics scholars are as follows:

Lucian A. Bebchuk is William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance at Harvard Law School. He has published widely on the economic and empirical study of litigation and settlement, and of compensation structures in firms and markets.

Albert Choi is Professor of Law at the University of Virginia Law School. He has published numerous works on the economics of contracts, compensation systems in organizations, and attorney's fee arrangements.

Andrew F. Daughety is Professor of Economics and Professor of Law at Vanderbilt University. He has published widely on the economics of litigation, settlement, and remedies, and the analysis of business organizations and market competition.

John J. Donohue III is Leighton Homer Surbeck Professor of Law at Yale Law School. He has published numerous works on the economic and empirical study of employment and civil rights laws, as well as on attorney's fee-shifting.

Theodore Eisenberg is Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University. He has published extensively on the empirical analysis of civil rights litigation, class actions, and remedies.

Bruce L. Hay is Professor of Law at Harvard Law School. He has published widely on the economics of litigation, settlement, attorney's fees, and the market for legal services.

Avery W. Katz is Milton Handler Professor of Law at Columbia Law School. He has published widely on the economics of contract arrangements, legal remedies, and attorney's fees.

Herbert M. Kritzer is Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. He has published extensively on the impact of legal fees in litigation as well as a wide range of other topics on civil litigation and legal practice.

Jennifer F. Reinganum is Bronson Ingram Professor of Economics and Professor of Law at Vanderbilt University. She has published widely on the economics of litigation, settlement, and remedies, and the analysis of business organizations and market competition.

Kathryn Spier is Domenico de Sole Professor of Law at Harvard Law School. She has published numerous articles on the economics of litigation, settlement, remedies, and attorney's fee arrangements.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988) amended Section 1988 to provide that in actions to enforce the civil rights laws, "the court, in its discretion, may allow the prevailing party, other than the United States, a *reasonable attorney's fee* as part of the costs." 42 U.S.C. § 1988(b) (emphasis added). The purpose of this fee-shifting statute is "to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel." *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 483 U.S. 711, 725 (1987). To achieve that purpose, the fees awarded under Section 1988 must provide lawyers the opportunity to earn remuneration comparable to what they could earn in other matters, and should provide them with the incentive to accept meritorious cases and resolve those cases in the most efficient manner.

The legal rule urged by petitioners, which would prohibit courts from taking into account the actual quality of performance and result achieved, would severely undermine the statutory objective. First, it would discourage lawyers from taking civil rights cases because they would not have the opportunity to earn, on average, remuneration comparable to what they could earn in other matters. Second, when compensation is based in part on the quality of performance and result, lawyers who are best suited to handle meritorious cases will have an increased

economic incentive to accept those cases; petitioners' rule would reduce that incentive. Third, rewarding actual performance and result encourages lawyers to pursue the most efficient means to resolve a matter successfully, rather than, as under petitioners' approach, the means that is likely to result in the highest lodestar fee.

To provide the appropriate incentives for lawyers to accept and efficiently resolve meritorious civil rights cases, courts must have the flexibility to enhance (or diminish) the lodestar fee, in appropriate cases, to account for the quality of performance and result. That conclusion is consistent with the statutory text and purpose, this Court's cases, and sound economic principles.

ARGUMENT

SECTION 1988 PERMITS A COURT TO TAKE THE QUALITY OF PERFORMANCE AND RESULT INTO ACCOUNT IN DETERMINING A "REASONABLE ATTORNEY'S FEE"

A. The Purpose Of Section 1988 Will Be Undermined If Courts Are Prohibited From Accounting For The Quality Of Performance And Result

1. To achieve the purpose of Section 1988, a "reasonable attorney's fee" must account for output as well as input

Congress enacted the fee-shifting provision of Section 1988 to encourage lawyers to accept representations in meritorious civil rights cases. A legal rule that requires courts to measure only a lawyer's "input"—rates and hours—in calculating a fee award will undermine the statute's purpose. To ensure that lawyers have the proper incentives to accept such cases, courts must have the discretion to consider, in appropriate cases, a lawyer's "output"—the quality of his performance and the result actually achieved—in determining what constitutes a "reasonable attorney's fee." 42 U.S.C. § 1988(b).

a. Remuneration in the legal marketplace reflects the quality of performance and result achieved

In enacting Section 1988, Congress recognized that to achieve the statute's purpose, the determination of a "reasonable attorney's fee" should be "governed by the same standards which prevail in other types of equally complex Federal litigation" and calculated in a manner that "is traditional with attorneys compensated by a fee-paying client." S. Rep. No. 94-1011, at 6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("Senate Report"). Otherwise, lawyers will not have the proper economic incentives to accept civil rights cases.

The manner in which lawyers have billed for the value of their services has varied greatly over time. For much of the twentieth century, billing arrangements that reflected the quality of performance and result were common in the legal marketplace, and in recent years clients have increasingly demanded such arrangements in place of the simple "rates times hours" approach. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 800-801 (2002) (tracing the history of lawyers' use of the billable hour); William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 17-22 (1996) (hourly billing became increasingly common over the course of the 1970s); Sherry L. Talton, *Time to Look Again at AFAs?*, ABA Section of Litigation, Summer 2009, at 6, 8 ("fixed or flat fees were actually the norm in the legal profession up until about 40 years ago"; in the past few years,

clients have increasingly demanded them because they are "one way to improve the quality of legal services [clients] receive").[2] Indeed, the "hours times rates" billing model has recently come under sharp attack from clients and lawyers alike, who believe that the model does not accurately capture the value provided, and encourages lawyers to prolong matters, engage in unnecessary tasks, and avoid efficient resolutions to cases. *See, e.g.*, Nathan Koppel & Ashby Jones, *'Billable Hour' Under Attack*, WALL ST. J., Aug. 24, 2009, at A1; Ben W. Heinman, Jr. & William F. Lee, *Two Veteran Lawyers Say Now Is the Time for Fixed Fees*, CORPORATE COUNSEL, Aug. 24, 2009;[3] Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 30, 2009, at A1; *see also* Kathryn E. Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS 262, 308-309 (A. Mitchell Polinsky & Steven Shavell, eds. 2007) (summarizing scholarly research on the economics of fee arrangements).

Clients, including the most sophisticated purchasers of legal services, are increasingly demanding that lawyers bill on the basis of value rather than time. For example, the Association of Corporate

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[2] *Cf. Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718-719 (5th Cir. 1974) (attorney's fees should reflect not only "[t]he customary fee for similar work in the community," but also the "ability of the attorneys" and "the results obtained").

[3] *Available at* http://www.law.com/jsp/article.jsp?id=1202433261281 (last visited Aug. 26, 2009).

Counsel, whose members include over 24,000 in-house attorneys representing more than 10,000 companies in 80 countries worldwide, has developed a program called the "Value Challenge." That association of corporate counsel "believe[s] that many traditional law firm business models * * * are not aligned with what corporate clients want and need: value-driven, high-quality legal services that deliver solutions for a reasonable cost." Association of Corporate Counsel, Value Challenge: About.[4] The Value Challenge "supports law firm efforts to implement change, including a willingness to reward those efforts," and seeks "[a] better alignment of interests of the corporate client and the outside firms." *Ibid.*

An American Bar Association report likewise describes the "corrosive impact of emphasis on billable hours," finding that the overreliance on billable hours "may not reflect value to the client." Am. Bar Ass'n, *ABA Commission on Billable Hours Report 2001-2002*, at 5 (Aug. 2002) ("ABA Billable Hours Report").[5] The Report recommends, among other things, alternative billing methods that are designed to better capture the value lawyers provide in specific matters.

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[4] *Available at* http://www.acc.com/valuechallenge/about/index.cfm (last visited Aug. 26, 2009).

[5] *Available at* http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf (last visited Aug. 26, 2009).

Lawyers have responded to these marketplace demands by accepting fee arrangements that expressly reflect the quality of their performance and the result they achieve. Koppel & Jones, *supra*, at A1 ("One survey found an increase of more than 50% [in 2009] in corporate spending on alternatives to the traditional hourly-fee model."). As the managing partner of Cravath, Swaine & Moore LLP recently explained to a business audience: "Quality insurance should come in the form of a success fee. If I win, I should be rewarded. That's not only fair, it places the incentive where it belongs." Evan R. Chesler, *Kill the Billable Hour*, FORBES, Jan. 12, 2009.[6] Law firms using alternative billing arrangements include Sidley Austin LLP; Orrick, Herrington & Sutcliffe LLP; Kirkland & Ellis LLP; Morgan, Lewis & Bockius LLP; Alston & Bird LLP; and Holland & Knight LLP. *See* Koppel & Jones, *supra*, at A1.[7]

One model being used with increasing frequency is the "partial contingency" or "hybrid contingency" fee arrangement. *See* James D. Shomper & Gardner G. Courson, *Alternative Fees for Litigation: Improved*

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[6] *Available at* http://www.forbes.com/forbes/2009/0112/026.html (last visited Aug. 26, 2009).

[7] *See also* Douglas S. Malan, *Interest in Alternative Billing Arrangements Heats Up*, CONNECTICUT LAW TRIBUNE, July 8, 2009, *available at* http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202432070948&hbxlogin=1 (last visited Aug. 26, 2009).

Control and Higher Value, 5 ACCA DOCKET 18 (2000);[8] Zusha Elinson, *Are Big Firms Warming Up to Alternative Fee Deals?*, THE RECORDER, July 11, 2007 (describing performance-based hybrid contingency arrangements used by Howrey LLP and Morrison & Foerster LLP).[9] In this model, a lawyer's normal hourly rates are discounted by a percentage (usually between 10%-20%) in exchange for a performance bonus or success award (*e.g.*, one to two times the discounted amount). That success award is generally tied to particular outcomes or benchmarks (*e.g.*, if the case is dismissed, resolved on summary judgment, or settled above or below a certain amount). *See* Shomper & Courson, *supra* (discussing variations of partial contingency billing). Fees earned in today's legal marketplace, in short, reflect the quality of performance and result in appropriate cases.

b. A reasonable fee should provide compensation comparable to what lawyers could earn in other matters

Lawyers, like other service providers, operate in an economic market and are subject to the laws of supply and demand. As a general matter, a lawyer will accept a particular representation only if the lawyer expects to earn fees that are at least equal to the fees he would earn if he accepted an alternative

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[8] *Available at* http://www.dupontlegalmodel.com/onlinelibrary_detail.asp?libid=96 (last visited Aug. 26, 2009).

[9] *Available at* http://www.law.com/jsp/article.jsp?id=1184058401567 (last visited Aug. 26, 2009).

matter. For the fee-shifting provision of Section 1988 to achieve its objective, therefore, it must provide remuneration that is, on average, equal to the remuneration lawyers could earn in other matters requiring comparable skills.

As discussed above, the clear trend in the marketplace is toward greater use of performance- or result-based fee structures. *See* Glater, *supra*, at A1 ("more clients are paying Cravath * * * success fees for positive outcomes, as well as payments for meeting other benchmarks"). According to one study, the amount spent "on alternative billing arrangements has totaled $13.1 billion this year, versus $8.6 billion in the like period of 2008." Koppel & Jones, *supra*, at A1. To provide the proper economic incentives to accept civil rights cases, courts should have the flexibility to make fee awards that account for the changing market for attorney compensation. As the fraction of matters in which performance- or result-based fee structures are used changes over time, courts should be able to reflect such changes in fee awards in civil rights cases.[10]

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[10] Amicus Washington Legal Foundation is thus wrong in asserting that the opportunity to earn a performance- or result-based fee has no effect on whether attorneys will accept representations in civil rights cases. Amicus Br. of Wash. Legal Found. 13-14. Even if such fees are infrequently awarded, it is the possibility of earning them in the future that affects the attorneys' incentives. And if there is *no* opportunity to earn such fees in civil rights cases, but ample opportunity to earn them in

(Continued on following page)

In the current market, if lawyers do not have the opportunity to earn performance- or result-based fee enhancements under Section 1988, the potential remuneration they can earn from civil rights cases will be, on average, lower than what they can earn in matters requiring comparable skills. That is especially true given that, under Section 1988, lawyers must accept the prospect of fee reductions or no fee recovery at all. For example, it is not unusual for courts to reduce a lawyer's actual market rate—*i.e.*, the rate that sophisticated, paying clients are willing to pay—before calculating the lodestar. *See, e.g.*, *Hopwood v. Texas*, 236 F.3d 256, 281 (5th Cir. 2000) (affirming the reduction of Theodore Olson's hourly rate from $450 to $225), *cert. denied*, 533 U.S. 929 (2001); *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385-1386 (10th Cir. 1987) (affirming reduction of law firm's hourly rates from $65-$140 per hour to $50-$75 per hour); *Daggett v. Kimmelman*, 811 F.2d 793, 799-800 (3d Cir. 1987) (affirming reduction of attorney's rate from $300 to $250 per hour); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 955-956 (1st Cir. 1984) (reducing the hourly rate for Laurence Tribe in a First Amendment case from $275 to $175). The economically rational lawyer (especially those of sufficient skill and experience to have other options) will thus be disinclined to take civil rights cases if, as petitioners contend, courts are flatly prohibited—

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other types of cases, the incentive to accept civil rights cases unquestionably will be diminished.

regardless of circumstances—from awarding an enhancement for superior performance or result.

c. Fees that account for the quality of performance and result encourage lawyers to accept matters for which they are best suited

An efficiently functioning legal marketplace will match lawyers to the cases they are best suited to handle. For example, while a lawyer may be capable of handling an antitrust case, a consumer class action, and a civil rights suit, he may be best suited for the civil rights suit, while a colleague with comparable skills and an identical billing rate may be best suited for the antitrust case. If the fees the lawyer and his colleague expect to earn in all three cases are the same, they will be economically indifferent to which of the three matters they work on. On the other hand, if the fees they expect to earn may differ based upon the quality of their actual performance and the result in the case, they will have a stronger economic incentive to accept the matter for which they are best suited.

Petitioners' legal rule would reduce that incentive, and thus interfere with the market's efficient allocation of legal resources. Under petitioners' regime, lawyers would know that they have no prospect of earning greater remuneration if they perform particularly well or achieve an extraordinary outcome. As a result, the lawyers who are best-equipped to identify and successfully resolve meritorious civil

rights cases will be less likely to accept those representations, and the purpose of the statute will be undermined.

d. Remuneration that accounts for the quality of performance and result encourages the efficient resolution of cases

This Court has recognized that the fee-shifting provision of Section 1988 should encourage lawyers to accept representations only in meritorious cases, and thus minimize the "social cost of * * * nonmeritorious claims." *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992). Consistent with that objective, Section 1988 should likewise encourage lawyers to resolve cases in the most efficient manner. *See* Amicus Br. of the State of Alabama, *et al.* 14 (State has an interest in settling litigation to effectuate good public policy); Amicus Br. of the Nat'l Sch. Bds. Ass'n 15 (civil rights laws should encourage prompt voluntary actions to address alleged violations).

If fee awards are determined using only rates and hours, there will be diminished economic incentive to resolve cases expeditiously and efficiently. The ABA Billable Hours Report found that hours-based compensation "penalizes the efficient and productive lawyer." ABA Billable Hours Report, *supra*, at 5. This is because the billable hour model provides "no concrete incentive * * * to resolve cases at an early stage, much less efficiently," as "the law firm gets paid no matter how inefficiently it performs and regardless of outcome." Shomper & Courson, *supra*.

Indeed, the *Dague* Court observed that a Federal Courts Study Committee Report had concluded that the lodestar method may "give lawyers an incentive to run up hours unnecessarily." 505 U.S. at 566 (citation omitted). These incentives are inconsistent with the purpose of Section 1988, which was "not designed as a form of economic relief to improve the financial lot of attorneys." *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*").

If courts have the flexibility to account for the quality of a lawyer's actual performance and the result obtained in determining a reasonable fee, they can reward lawyers who achieve outstanding outcomes in an efficient manner. That, in turn, will provide appropriate economic incentives for lawyers to consider litigation strategies that serve not only their clients' interests in obtaining redress, but also the judicial system's interest in resolving matters efficiently.

2. *The conventional lodestar calculation does not take appropriate account of the quality of performance or result*

a. A rigid "market rate times hours" calculation does not include actual performance or result

The conventional lodestar calculation—which is the product of hourly rate and hours billed—does not adequately account for the quality of actual performance or result obtained. The hourly rate component

simply reflects the market's expectations of the lawyer's skills. Those expectations are generally a function of the lawyer's education, substantive knowledge, reputation, and prior experience. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

But in many cases, past performance is not a reliable predictor of future success. In any given case, a lawyer may exceed the performance expectations that are reflected in the hourly rate. That is true even in situations where the lawyer's hourly rate is at the top of the relevant legal market: even the most highly paid and experienced lawyers perform more brilliantly in some cases than in others. *See* Tony Mauro, BLOG OF THE LEGAL TIMES, *After Supreme Court Scuffle, Ted Olson Earns His Keep*, Nov. 3, 2008 ("Perhaps sharpened by the rivalry [with another lawyer in the case], Olson was at his best today, delivering a focused, simple argument on the issue before the Court * * * .").[11]

The government is thus simply wrong in asserting that the quality of representation and the result obtained "[a]re [a]lready [r]eflected [i]n [t]he [l]odestar [c]alculation." Amicus Br. of the United States 17. The conventional lodestar fee calculation—hours times market rate—does not capture the value a lawyer provides by outperforming (or underperforming) the expectations embodied in the

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[11] *Available at* http://legaltimes.typepad.com/blt/2008/11/ted-olson-earns-his-keep.html (last visited Aug. 26, 2009).

hourly rate. Courts already recognize this principle when they reduce the lodestar calculation to arrive at a reasonable fee in cases where lawyers underperform;[12] they should likewise be able to recognize it in cases in which lawyers outperform. And as respondents explain, Resp. Br. 26-31, courts routinely consider the quality of representation and the result in awarding fees that exceed the strict lodestar amount in commercial cases. As a legal and economic matter, considering the quality of representation and award is reasonable under Section 1988 for the same reason that it is reasonable in those commercial cases.

To be sure, in some cases, enhanced performance and result may be the product, in part, of a greater number of hours expended on a matter. But in many cases, the reverse will be true: the quality of the lawyer's performance and the result achieved will be the product of strategic decisions, successful discovery, or outstanding advocacy that leads to an early resolution. And even in cases that involve many hours of work, the quality of performance and result in a particular case may far exceed those of other cases in which comparable time is expended. In each

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[12] For example, in *Lohman v. Duryea Borough*, No. 08-3524, 2009 WL 2183056 (3d Cir. July 23, 2009), the Third Circuit affirmed the District Court's reduction of the lodestar amount for unusually limited success where the plaintiff rejected a settlement offer of $75,000, and, after trial, was awarded only $12,205.

of those cases, the rigid "rates times hours" lodestar calculation yields an unreasonably low fee, one that does not reflect the value of the lawyer's work.

As petitioners observe, courts could account for the quality of performance or result achieved by using above-market or below-market rates in the lodestar calculation. Pet. Br. 54-55. But that approach would have no particular advantage over the enhancement used by the court below. It is no easier to administer, as it requires a court to determine an appropriate multiplier to be applied to the attorney's billing rate (as opposed to the overall fee). If anything, it is less reflective of market compensation, which is increasingly making performance- or result-based remuneration a function of the overall fee. Nor is a rate adjustment approach necessary to properly account for circumstances in which lawyers underperform. Moreover, whether courts adjust rates, or overall fees, is of no consequence as an economic matter: the critical point is that they must have the flexibility, in appropriate cases, to adjust the conventional lodestar calculation to reflect the quality of performance and result achieved in order to award a "reasonable attorney's fee."

b. Enhancements made on the basis of performance and quality are not "windfalls"

Petitioners' contention that a fee that exceeds reasonable "hours times rates" provides attorneys with an unauthorized "windfall," Pet. Br. 43, is wrong. As demonstrated above, exclusive reliance on

an "hours times rates" model will result, on average, in below-market compensation. By accounting for the quality of performance and result in appropriate cases, courts can ensure that the market provides appropriate price signals, so that lawyers know they have the opportunity to earn a competitive level of compensation when accepting a civil rights case.

Moreover, in those cases in which a performance- or result-based enhancement is awarded, there is no "windfall" precisely because the amount of the enhancement has been *earned* based on the quality of the legal services provided. The fact that sophisticated buyers and sellers in the legal services marketplace agree upon performance- and result-based enhancements proves that such awards are not "windfalls."

Nor did Congress believe such enhancements were "windfalls." The Senate Report cited three cases as illustrative of matters in which the "appropriate standards" for determining a reasonable rate were "correctly applied"—*Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenberg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). *See* Senate Report at 6. In each of those cases, the district court specifically found that the prevailing party's counsel provided excellent service or obtained an excellent result and took that into account in affixing the fee award. *Stanford Daily*, 64 F.R.D. at 686-687 ("plaintiffs' attorneys provided excellent legal services"); *Davis*, 8

E.P.D. ¶ 9444 at para. 7 (plaintiff's counsel "achieved excellent results"); *Swann*, 66 F.R.D. at 484 (the "results obtained were excellent"). Indeed, in *Stanford Daily*—which the Senate Report cites as a case "which [did] not produce windfalls," Senate Report at 6—the district court found that "the attorneys' work, and the results which they obtained * * * merit[ed] an increase in the base figure upon which a reasonable attorneys' fees award is computed." *Stanford Daily*, 64 F.R.D. at 687. Congress thus contemplated, contrary to petitioners' claim, that courts can account for the actual quality of performance and result in determining a reasonable fee without producing windfalls.

B. Remuneration For The Actual Quality Of Performance Or Result Is Consistent With The Statutory Text And Purpose

The text of Section 1988 authorizes an award of a "reasonable attorney's fee." 42 U.S.C. § 1988(b). What is a "reasonable" fee should reflect the broader marketplace for legal services, which (as discussed above) takes into account, in appropriate cases, the actual quality of the lawyer's performance and the result obtained. The ordinary meaning of the statutory language is certainly capacious enough to permit consideration of those concepts. And reading Section 1988 to categorically bar such considerations would undermine the provision's fundamental purpose.

Indeed, at the time Congress passed this fee-shifting provision, it contemplated that those very

factors would be considered in determining a "reasonable" fee. Both the House and Senate Reports pointed to the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as providing the "appropriate standards" for determining a fee award under Section 1988. *See* Senate Report at 6; H.R. Rep. No. 94-1558, at 8-9 (1976). Those factors include "the results obtained" and the "ability of the attorneys." *Johnson*, 488 F.2d at 717-719. Moreover, as noted above, the Senate Report favorably cited cases that awarded fees based on the fact that the attorneys actually "provided excellent legal services," *Stanford Daily*, 64 F.R.D. at 686-687, and "achieved excellent results," *Davis*, 8 E.P.D. ¶ 9444 at para. 7. Senate Report at 6. In Congress's view, such considerations were important because they were necessary "to attract competent counsel" to take on civil rights cases by producing fee awards comparable to those available in the marketplace for "other types of equally complex Federal litigation, such as antitrust cases." *Ibid.*

This Court's cases have consistently affirmed those principles. The Court has recognized that the determination of what fee is "reasonable" should take into account the broader marketplace for legal services. *See, e.g.*, *Blum*, 465 U.S. at 886; *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983). Such market-based considerations are the best way to

ensure that competent counsel will accept representations in meritorious civil rights cases.[13]

Moreover, while the Court has established a presumption that the "'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee," *Blum*, 465 U.S. at 897 (quoting *Hensley*, 461 U.S. at 434); *see Dague*, 505 U.S. at 562, it has expressly rejected the notion that "an 'upward adjustment' is never permissible." *Blum*, 465 U.S. at 897. To the contrary, the Court has repeatedly affirmed the potential availability of the very type of enhancement awarded here. As the Court explained in *Blum*, "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." *Ibid.*

One such circumstance is "the important factor" of "results obtained," *Hensley*, 461 U.S. at 434, including "exceptional success." *Blum*, 465 U.S. at 897 (quoting *Hensley*, 461 U.S. at 435); *accord City of Riverside v. Rivera*, 477 U.S. 561, 568-573 (1986).

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[13] To be sure, the Court has not interpreted fee-shifting statutes "to mimic the intricacies of the fee-paying market *in every respect*." *Dague*, 505 U.S. at 566-567 (emphasis added). But, as explained above (pp. 14-16, *supra*), the rationale for not mirroring the private market for contingency fees (namely, that to do so might provide incentive and compensation to pursue non-meritorious cases) cuts the other way here. Permitting an enhancement for actual performance and actual results will provide incentives for lawyers who are the best fit for certain cases to pursue those cases and to resolve them efficiently.

Another is the actual quality of performance of counsel. While this Court has observed that a lawyer's "post-engagement performance" is "normally reflected in the reasonable hourly rate," it has never foreclosed an enhancement on that basis. *Delaware Valley I*, 478 U.S. at 566.

The Court should not do so now. For most fee awards, the lodestar method may be an appropriate measure of compensation. But it may not be an appropriate measure if a lawyer's actual performance or the outcome achieved is truly extraordinary—either extraordinarily good or extraordinarily poor. Accordingly, for all the reasons discussed above, a district court should be permitted to consider the actual quality of a lawyer's performance and the actual result obtained in arriving at a "reasonable attorney's fee," at least in exceptional cases.

CONCLUSION

For the foregoing reasons and those in respondents' brief, the judgment of the court of appeals should be affirmed.

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August 28, 2009

AMICUS CURIAE BRIEF

No. 08-970

IN THE

Supreme Court of the United States

SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF GEORGIA, *ET AL.*,

Petitioners,

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AARP, ALLIANCE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL URBAN LEAGUE, NATIONAL WOMEN'S LAW CENTER, AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can an attorneys' fee award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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INTERESTS OF AMICI

A coalition of various organizations devoted to the cause of furthering civil rights join here as amici curiae on behalf of Respondent Kenny A.[1] Amici believe that 42 U.S.C. § 1988, as well as this Court's precedent, empower district court judges to adjust the attorney fee award that would be produced by the lodestar methodology in those rare instances in which the attorneys perform superlatively well and obtain exceptionally good results.

Individual statements of interest are provided in the Appendix to the Brief.

SUMMARY OF ARGUMENT

Both 42 U.S.C. § 1988 and Supreme Court precedent empower judges to adjust fee awards in civil rights cases when the quality of the lawyers' performance is superb and the results they obtain are exceptional. Section 1988 vests judges with the discretion to award a reasonable attorneys' fee to a prevailing plaintiff. Courts throughout the country use the "lodestar" method, a calculation based on the reasonable number of hours worked multiplied by a reasonable hourly rate, which provides the starting point for determining the reasonable fees that are to be awarded to a prevailing plaintiff.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

In most—but not all—cases, the lodestar will produce a "reasonable" fee. However, in those rare instances in which the lodestar calculation produces an unreasonable result, judges have—and should have—the discretion to adjust the lodestar in order to arrive at a "reasonable" fee. The Supreme Court has recognized that an upward adjustment such as the one in this case may be appropriate to reflect exceptional performance and results. *See Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). Judges are well-situated to determine whether the attorneys' work and the outcome they achieved for their clients are reasonably reflected in the lodestar estimate. When they are not, adjustments can be made, and such adjustments are consistent with the legislative purpose of Section 1988, which was enacted to promote vigorous enforcement of civil rights laws.

The attorneys' work in this case certainly justifies an enhancement. The district court's 100-page decision regarding plaintiffs' application for an award of attorneys' fees and expenses included detailed findings of fact to support the conclusion that an enhancement was justified by plaintiffs' counsels' extraordinary performance and the exceptional results that they obtained. The attorneys' superlative work, which brought exceptional results for a large class of children in a deteriorating foster care system, qualifies as one of the rare situations in which the upward adjustment of the lodestar estimate is appropriate in order to provide a reasonable fee.

ARGUMENT

I. BOTH 42 U.S.C. § 1988(B) AND SUPREME COURT PRECEDENT EMPOWER JUDGES TO ADJUST FEE AWARDS UPWARDS IN CIVIL RIGHTS CASES WHEN THE QUALITY OF THE LAWYERS' PERFORMANCE IS SUPERB AND THE RESULTS THEY OBTAIN ARE EXCEPTIONAL.

42 U.S.C. § 1988(b) provides, in pertinent part, that "in any action or proceeding to enforce [various federal civil rights statutes], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Congress intended that the attorneys' fees in civil rights cases resemble those earned by private practitioners of similar experience and quality. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel"); *Hensley v. Eckerhart*, 461 U.S. 424, 430, n.4 ("It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature.") (quoting S. Rep. No. 94-1011, p. 6 (1976)); *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) ("Congress intended that statutory fee awards be 'adequate to attract competent counsel . . . .'") (quoting S. Rep. No. 94-1011, p.6 (1976)).

While Congress made clear that a

"reasonable" fee may be awarded, it did not dictate how that "reasonable" fee should be calculated. Courts have applied the "lodestar" method to determine a presumptive award, calculating the product of "reasonable" hours and a "reasonable" hourly rate. *Rivera*, 477 U.S. at 468.

A. Supreme Court Precedent Makes Clear that the "Lodestar" Method Provides a Presumptively Reasonable Initial Estimate, and Additional Considerations May Lead the District Court to Adjust the Fee Upward.

The Supreme Court has stated that the lodestar method is "[t]he most useful starting point for determining the amount of a reasonable fee." *Hensley*, 461 U.S. at 433. This "calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Id.* The Court has stated repeatedly that the lodestar calculation "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. The Court has specifically noted that "in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

The lodestar method has an obvious attraction: it reduces the determination of a reasonable attorney's fee to two component questions: (1) How many hours did the attorney reasonably expend working on the case? and (2) What is a reasonable rate for the attorney to charge per hour? It is often easier to resolve each of these individual component questions than to try to arrive

at a "reasonable" fee in the abstract. To determine the number of hours that a plaintiff's attorney has reasonably spent working on a case, courts require plaintiff's attorneys to carefully document and justify their hours. The Defendant's attorney has the opportunity to challenge both the hours and the rates sought, and then Courts review these submissions to determine a reasonable fee award.

A plaintiff who applies for attorney's fees bears the burden of establishing the appropriate hourly rate and the number of hours reasonably expended. *Blum*, 465 U.S. at 897. The court then has discretion to determine whether the plaintiff's claimed hours and rates are indeed reasonable. *Id.* at 897 n.19; *Hensley*, 461 U.S. at 437. Reasonable hourly rates are typically calculated based on the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 895.

A successful civil rights plaintiff should be granted a "fully compensatory fee." *Hensley*, 461 U.S. at 435. To that end, the appropriate hourly rate should reflect the attorney's experience, skill, and reputation, as well as the types of services that the attorney is providing. *Id.* n.11. The hourly rates charged in the private market for similar services by attorneys with similar levels of experience and skill should provide guidance as to the appropriate hourly rate. *Id.*; *see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (stating that reasonable attorneys' fees are based on "rates and practices prevailing in the relevant market, *i.e.*, in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").

In practice, the application of the lodestar can differ significantly among jurisdictions. In the Washington, D.C. metropolitan area, for example, courts refer to a preset matrix, referred to as the "Laffey Matrix," to determine the "reasonable" hourly rate. The Laffey Matrix defines hourly rates based solely on the year that the attorney graduated from law school, assigning each attorney one of five possible hourly rates. *See, e.g., Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).[2] Many jurisdictions have adopted some variation of this matrix.[3] In these jurisdictions, such factors as the caliber of the attorney's performance in the matter at issue and the quality of the results obtained are simply not included in the "reasonable" hourly rate.[4]

"When . . . the applicant for a fee has [demonstrated] that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Blum*, 465 U.S. at 897. This calculation is merely a presumption, however; the Court has consistently recognized that there are circumstances

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[2] *See also* The Laffey Matrix, http://www.laffeymatrix.com/ (last visited Aug. 26, 2009).

[3] *See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694 (3rd Cir. 2005); *Sullivan v. Sullivan*, 958 F.2d 574 (4th Cir. 1992); *Garnes v. Barnhardt*, No. 02c4428, 2006 U.S. Dist. LEXIS 5938 (N.D. Cal. Jan. 31, 2006); *North Carolina Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 168 F. Supp. 2d 569 (M.D.N.C. 2001).

[4] Nor, for that matter, are a number of other factors, such as the attorney's reputation, his or her level of experience with the particular types of cases at issue, the rates usually charged by such attorney, etc.

in which the lodestar estimate would not be reasonable. *See, e.g., id.* ("The statute requires a 'reasonable fee,' and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high.").

In *Blum v. Stenson*, the Court concluded that an adjustment to the lodestar estimate was not appropriate based on the facts at issue, but specifically "reject[ed] petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988." 465 U.S. 886, 901 (1984). The Court reaffirmed and expanded upon the statements it made in *Hensley*. The Court held that the lodestar estimate "is presumed to be the reasonable fee" to which plaintiff's counsel is entitled. *Id.* at 897. The Court reiterated that the quality of the plaintiff's attorney factors into the lodestar calculation; however, the Court also noted that a district court may increase an attorney's fee award above the lodestar estimate "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899 (quoting *Hensley*, 461 U.S. at 435). The Court explained that the superlative performance of the attorneys and the outstanding results may not be reflected in the lodestar, and therefore it would be appropriate for the court to adjust the lodestar estimate in such cases. *Id.* at 901.

In *Pennsylvania v. Delaware Valley Citizens' Council*, the Court followed its determination in

Blum that adjustments to the lodestar estimate are appropriate in the rare cases in which exceptional work by the attorneys produces an exceptional outcome. *See* 478 U.S. 546, 565-66 (1986) (stating that "ordinarily" representation should not be used to justify modification of the lodestar and that modifications are appropriate in "rare" and "exceptional" cases). The Court reviewed the particular facts at issue and determined, as it had in *Blum*, that the attorneys' performance and the outcome did not justify adjusting the lodestar estimate:

> [N]either the District Court nor the Court of Appeals made detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate. In the absence of such evidence and such findings, we find no reason to increase the fee award in Phase V for the quality of representation.

Id. at 568. The Court clearly implied that an increased fee award would be permissible in instances in which the lower courts made such detailed factual findings.

Changes in the market for legal services also counsel against strict reliance on the lodestar methodology in all cases. Recent commentary on the market for legal services suggests that lawyers are increasingly moving away from the traditional

hourly billing model to flat fees, retainers, partial contingencies, defendant contingencies, success fees, and other similar arrangements.[5] There may currently be legal markets (and, in the future, it seems likely that there will be) in which hourly billing is not standard and, therefore, a strict lodestar methodology, without the possibility of both upward and downward adjustments, will not produce sensible results. The significant possibility of widespread use of alternatives to the billable hour counsels in favor of not shackling judges to a strict lodestar calculation in every case. Instead, it favors giving judges the flexibility to award a "reasonable fee" by adjusting the lodestar in appropriate circumstances.

While the lodestar method has the advantage of transforming the open-ended question of what constitutes a reasonable attorney fee into two more specific inquiries, it also converts the reasonable attorney's fee calculation from a single estimate into

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[5] *See, e.g.*, Nathan Koppel & Ashby Jones, *'Billable Hour' Under Attack*, Wall Street Journal, Aug. 24, 2009 (noting a move away from billable hour arrangements to alternative arrangements, including a survey that "found an increase of more than 50% this year in corporate spending on alternatives to the traditional hourly-fee model"); Evan R. Chesler, *Kill the Billable Hour*, Forbes Magazine, Jan. 12, 2009 (advocating more widespread adoption of flat fee arrangements and success fees); Scott Turow, *The Billable Hour Must Die*, ABA Journal, Aug. 2007 ("[D]ollars times hours is . . . worse for clients, bad for the attorney-client relationship, and bad for the image of our profession."); Alan Feuer, *A Study in Why Major Law Firms Are Shrinking*, N.Y. Times, June 5, 2009 ("[T]he natural order of [New York law firms] has been set on end by the economic crisis and the possible disappearance of fixtures like . . . the billable hour itself (increasingly replaced by flat rates or retainers in a client's market).").

a product of two estimates. In estimations, inaccuracies are expected and inevitable. The lodestar calculation, which relies on such imprecise concepts as "the number of hours reasonably expended" and "reasonable hourly rate" as inputs, *Hensley*, 461 U.S. at 433, is no exception to this rule. This is compounded by the fact that "reasonable hourly rate" might itself depend on non-numerical concepts such as "skill" and "expertise." Because the lodestar method relies on multiplying inexact estimates, it can compound inaccuracies in those estimates to produce a result that is unreasonable.[6] Therefore, adjustments to the lodestar may be necessary in individual cases.

The variability of the overall lodestar estimate increases directly and dramatically with the imprecision of the component estimates, and each of

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[6] A mathematical example helps to illustrate how this concept can apply even in instances, unlike the lodestar, in which precise, objective measurement of the inputted estimates is possible. Suppose that one was tasked with estimating the size of a rectangular room. Instead of estimating the size directly, one might first estimate its width, length, and height and then multiply the three items to obtain an estimate of the volume. Suppose further that one estimates each dimension at 10 feet, but each measurement is actually 11 feet. Each of these estimates, considered on its own, seems reasonable. Combined, however, they produce an estimated room size of 1,000 cubic feet, while the actual room size is 1,331 cubic feet, nearly a third larger than the estimate. This is a considerable disparity and it shows how aggregating individually reasonable component estimates may lead to unreasonable cumulative results. As noted above, this problem is magnified considerably when the estimated individual components are not simple, easily definable items such as distance measurements, but instead such vague notions as the reasonable number of hours worked on a matter and a reasonable hourly billing rate.

the lodestar components is, by its nature, variable and imprecise. Reasonable minds may differ greatly in their opinions on how many hours it is reasonable to spend working on a given case and on what constitutes a reasonable hourly rate. Thus, adjustments to the lodestar may be needed to arrive at a reasonable fee.

B. Prohibiting Judges from Making Upward Adjustments to Fee Awards in Instances in Which The Lodestar Provides An Unreasonably Low Estimate Would Prevent Judges from Awarding "Reasonable" Attorney's Fees, Violating the Plain Text of 42 U.S.C. § 1988(B) and Thwarting Congressional Intent.

The Supreme Court has upheld fee adjustments under Section 1988 based on the quality of the results obtained. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court ruled that a plaintiff who secured nominal damages but not compensatory damages was a "prevailing party" under § 1988, and therefore entitled to a reasonable attorney's fee. Nonetheless, the Court affirmed the judgment of the court of appeals that plaintiffs were not entitled to attorney fees. The Court reasoned that the court of appeals had been correct in overturning the district court's ruling because "the District Court awarded $280,000 in attorney's fees without 'consider[ing] the relationship between the extent of success and the amount of the fee award.'" 506 U.S. at 115-16 (citing *Hensley*, 461 U.S. at 438).

The Court's ruling in *Farrar* demonstrates that a "reasonable attorney's fee" is measured with

respect to the particular litigation at issue, retrospectively. Put another way, once the Court determined that the plaintiff was a prevailing party, the Court looked to see what was reasonable in light of the actual results of litigating the case, not what would have been reasonable for the parties to contract to beforehand. Similarly, when considering how many hours the plaintiff's attorney reasonably expended, the district court does not consider how many hours the attorney would reasonably have expected to expend on the matter, but how many hours the attorney actually reasonably spent working on the case. *See id.* at 115-16 ("[It is] the court's 'central' responsibility to 'make the assessment of what is a reasonable fee under the circumstances of the case.'") (quoting Blanchard v. Bergeron, 489 U.S. 87, 96 (1989)).

Thus, when considering whether a fee award is "reasonable" for purposes of Section 1988, the proper question is whether the fee is reasonable in light of how the attorney actually pursued the case and what results were actually obtained. By contrast, the reasonable hourly rate used for the lodestar calculation is often tied to the attorney's general level of experience and skill, which may be different from the degree of skill that the attorney actually exhibited when pursuing the case at issue. In some instances, such as in jurisdictions that rely on the Laffey Matrix, the reasonable hourly rate is solely dependent on the number of years that have passed since the attorney in question graduated from law school.[7] In these cases, the only way that

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[7] It is also worth noting that the Laffey Matrix breaks lawyers into five groups based on their number of years of experience and assigns the same hourly fee to all lawyers within the same group, even if they have different levels of experience.

exceptional performance or results can be taken into account is through an adjustment to the lodestar estimate.

Accordingly, as the Court has recognized, the court may adjust the lodestar fee estimate downward in instances in which the plaintiff's attorney achieves poor results,[8] and may adjust the lodestar fee estimate upwards when the plaintiff's attorney does superlative work and achieves exceptional results.[9] Judges must be allowed to deviate from the lodestar estimate in these instances in order to comport with the statutory touchstone of reasonableness.

Thus, a "reasonable hourly rate" for a lawyer can only mean one of five rates in a particular year. Currently, those rates are $285 (1-3 years' experience), $349 (4-7 years' experience), $505 (8-10 years' experience), $569 (11-19 years' experience), and $686 (20 years' experience). Thus, a lawyer who graduated seven years ago and has spent her time litigating a particular type of civil rights case would have a 45% lower hourly rate for her work on a civil rights case than a lawyer with eight years of unrelated experience (transactional tax practice, for example) who may never before have taken a deposition, drafted a motion, or even seen a trial.

[8] *See Farrar*, 506 U.S. at 115 ("In some circumstances, even a plaintiff who formally "prevails under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.").

[9] *See Blum*, 465 U.S. at 897.

II. INTERPRETING SECTION 1988 AS GIVING JUDGES DISCRETION TO ADJUST LODESTAR-ESTIMATED ATTORNEY'S FEE AWARDS FOR EXCEPTIONAL PERFORMANCE AND RESULTS FURTHERS CONGRESS'S INTENT AND PURPOSE IN ENACTING SECTION 1988.

Section 1988 must be construed in accordance with Congress's underlying intent in passing the statute, which was to encourage vigorous private enforcement of civil rights laws. In *Hensley*, the Court looked not only to the language of Section 1988, but also to the legislative history to give proper meaning to the term "reasonable fees." 461 U.S. at 430 n.4. Prohibiting courts from exercising their discretion to enhance fee awards in exceptional cases would contravene the congressional intent to encourage attorneys to bring civil rights cases.

Decades have passed since the Supreme Court first interpreted Section 1988 as supporting fee adjustments when the attorneys' work and the results of the litigation are exceptional, and the Court has since reiterated its initial interpretation in its subsequent opinions. During those years, Congress has not amended Section 1988 in an effort to overturn the rule clearly established by *Hensley*, *Blum*, and *Delaware Valley*. Congress's inaction constitutes tacit confirmation that the Court's interpretation of the statute is consistent with legislative intent.

A. Congress Created Section 1988's Fee Award Provisions to Improve the Enforcement of Civil Rights Laws by Encouraging Attorneys to Bring Civil Rights Cases.

In enacting Section 1988, Congress aimed to ensure that plaintiffs seeking redress for civil rights violations would be able to secure representation. *See, e.g., Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968) ("Congress . . . enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief . . . ."). Congress also sought to ensure that the costs of violating civil rights laws were more fully borne by the violators, not the victims. *Id.* ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.") Congress's ultimate goal was to reduce the frequency of civil rights violations and promote the vindication of civil rights. *See* S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963). Consistent with this congressional intent, the Supreme Court has recognized that "[w]hen a plaintiff brings a [civil rights] action . . . and obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Piggie Park Enter.*, 390 U.S. at 402 (citing S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963)).

The Court has been careful to interpret Section 1988 consistently with its purpose. In *Blanchard v. Bergeron*, the Fifth Circuit held that a contingent-fee contract between the plaintiff and its attorney imposed a limit on the fee award that the attorney could recover. 831 F.2d 563 (5th Cir. 1987), *rev'd* 489 U.S. 87, 96 (1989). The Supreme Court reversed the Fifth Circuit's decision, holding that "a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). The Court reasoned:

> If a contingent-fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. Affirming the decision below would create an artificial disincentive for an attorney who enters into a contingent-fee agreement, unsure of whether his client's claim sounded in state tort law or in federal civil rights, from fully exploring all possible avenues of relief.

Id. at 95.

Limiting enhancements to the lodestar estimate would render the lodestar an artificial

ceiling on fee awards in the same manner, and with the same result, as the contingent-fee contract in *Blanchard*, and the Court should reject this result for the same reasons. To illustrate, if this Court holds that enhancements to the lodestar based on quality of representation and results obtained are never permissible, the lodestar would become a rigid upper limit on the compensation that civil rights lawyers would ever be able to garner from successful civil rights litigation. The Court has held that "complexity" and "novelty" of litigated issues are not permissible grounds to increase the lodestar figure, *Blum*, 465 U.S. at 898-89, and neither is contingent risk of loss. *City of Burlington v. Dague,* 505 U.S. 557, 566 (1992). To put quality of representation and results obtained in the same category as complexity of issues and risk of loss would render the lodestar a ceiling on fee awards for all practical purposes.

If there were such as ceiling, it is not difficult to imagine instances in which an attorney would have an incentive to pursue tort claims due to the potential for greater remuneration under a contingent-fee contract, and a corresponding disincentive to pursue federal civil rights claims and injunctive relief. As the Court recognized in *Blanchard*, this result was not the intent of Congress when it passed 42 U.S.C. § 1988, and thus setting the lodestar as a ceiling on fee awards should be no more permissible than setting a contingency fee as a ceiling on fee awards.

B. To Hold That Lodestar-Based Fee Awards May Never Be Increased for Quality of Representation or Results Obtained Would Defeat the Congressional Purpose of 42 U.S.C. § 1988 As Identified in *Blanchard*.

In *Farrar v. Hobby*, the Court reiterated that trial courts should "consider[] the relationship between the extent of success and the amount of the fee award," 506 U.S. at 115-116 (quoting *Hensley*, 461 U.S. at 483). *Farrar* suggests that consideration of the "results obtained" is not entirely subsumed into the lodestar but is a separate factor that courts may consider when calculating reasonable fee awards.

While *Farrar* dealt only with a reduction, and not an increase, of a lodestar-based fee award, to hold that courts' exercise of discretion in adjusting the lodestar extends only to reductions for poor results, and not to increases for excellent results, is incongruous and would defy reason. The Court recognized the undesirability of one-way discretion when it held that contingent risk of loss is not a valid basis to enhance a lodestar-based fee award in *Dague*. 505 U.S. at 566 ("To engraft [contingency enhancement] onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it."). In like manner, to hold that results obtained is never a permissible basis for increasing a lodestar-based fee would leave district courts with a scheme by which they could use non-lodestar factors only to reduce a fee award but not to increase it.

Empowering courts to lower fee awards, but eliminating their discretion to raise them, would be particularly inappropriate, given that Congress's goal in enacting Section 1988 was to help civil rights plaintiffs gain access to courts by increasing the incentives for attorneys to accept civil rights cases. *See Riverside v. Rivera*, 477 U.S. 561, 575-77 (1986) (citing S. Rep. No. 94-1011 (1976) and H.R. Rep. No. 94-1558 (1976) and noting the legislative intent behind Section 1988 was to encourage counsel to represent individuals in bringing civil rights cases because many such plaintiffs do not have the resources to afford competent counsel); *Hensley*, 461 U.S. at 424 ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (citing H.R. Rep. No. 94-1558, p. 1 (1976)).

While it is true that Congress did not wish for plaintiffs' attorneys to receive a windfall from the statute,[10] this possibility was not Congress's primary concern, and allowing district courts to enhance fee awards above the lodestar estimate in truly exceptional cases does not present this problem. By definition, a windfall is an unearned gain; an enhancement that is awarded because an attorney performs superbly and generates extraordinary results is clearly something that must be earned. And, in any event, even a fee that is adjusted upwards must always be "reasonable."

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[10] *See, e.g.*, *Rivera*, 477 U.S. at 580 ("Congress intended that statutory fee awards be 'adequate to attract competent counsel, but . . . not produce windfalls to attorneys.'") (quoting S. Rep. No. 94-1011, p.6 (1976)).

Preventing judges from increasing fee awards in all cases would also violate the principle that trial judges must have discretion to calculate reasonable fee awards, a principle that the Court has repeatedly recognized. *See Blanchard*, 489 U.S. at 96 ("It is central to the awarding of attorney's fees under 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case."); *Blum*, 465 U.S. at 899 ("The District Court, having tried the case, was in the best position to conclude that 'the quality of representation was high.'" (quotation omitted)); *Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.").

C. Allowing Courts to Adjust the Lodestar Estimate in Exceptional Cases Does Not Discourage Settlements.

The Supreme Court has long recognized a societal interest in promoting settlements of claims. *See Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("[C]ompromises of disputed claims are favored by the courts . . . ." (citation omitted)). Lodestar adjustments in rare cases will not discourage defendants from settling and will not encourage plaintiffs' attorneys to advise their clients against settlement.

The Court has made it clear that lodestar adjustments may be awarded only in rare circumstances. *See Blum*, 465 U.S. at 899 (deciding

that fee enhancements would be appropriate in the rare case of superior quality of service and "exceptional" success) (citing *Hensley*, 461 U.S. at 435); *Delaware Valley*, 478 U.S. at 565-66 (stating that modifications are appropriate in "rare" and "exceptional" cases). It seems unlikely that attorneys would put aside their ethical obligations to act in the best interests of their clients and turn down a settlement due to speculation about the slight possibility of obtaining a fee enhancement. In fact, the possibility of an enhancement did not discourage the settlement in this case.

In addition, by doing so, an attorney would delay receipt of the fee for the work he or she had done up until the settlement for the small possibility of receiving an enhancement after trial. Further, the attorney would be risking his or her fee by going to trial, since he or she would only be entitled to attorney's fees if the plaintiff were a prevailing party.

The institutions joining in this amicus brief have a substantial combined number of years of experience with civil rights litigation. In our combined experience, the possibility of a fee enhancement has not discouraged settlements. Given how rarely fee enhancements are awarded and the contexts in which they are available, enhancements do not discourage parties from reaching a settlement.

III. IN THIS CASE, COUNSEL'S EXTRAORDINARY PERFORMANCE AND THE EXCEPTIONAL RESULTS THEY OBTAINED MERIT AN ENHANCEMENT TO THE LODESTAR CALCULATION.

The district court's 100-page decision regarding plaintiffs' application for an award of attorneys' fees and expenses included detailed findings of fact in support of the conclusion that an enhancement was justified by plaintiffs' counsel's extraordinary performance and the exceptional results that they obtained.

The district court meticulously documented the massive scope of the undertaking. Children's Rights represented the plaintiffs and a putative class of all 3,000 foster children in two counties. *Kenny A v. Perdue*, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2005). The 75-page complaint asserted fifteen causes of action based on alleged systemic deficiencies in foster care in two counties. *Id.* at 1267. Plaintiffs' counsel devoted in excess of 30,000 hours of labor over a five-year period. *Id.* at 1273. Nearly half of a million pages of documents were reviewed and analyzed. *Id.* at 1276-77. More than sixty witnesses were deposed. *Id.* Plaintiffs retained four expert witnesses. Due to the breadth of the facts, legal issues, and contentious nature of the litigation, the district court observed that it was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench." *Id.* at 1266.

Even more impressive than the scope of the undertaking was the scope of relief that plaintiffs'

counsel obtained. The 47-page consent decree provides "sweeping relief" and "extraordinary benefits to the plaintiff class." *Id.* at 1282, 1289. The decree includes thirty-one outcome measures that the state agreed to meet and sustain. *Id.* at 1289. The district court judge observed, "After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290. Plaintiffs' success in this case was "truly exceptional." *Id.* at 1289.

Other courts that have awarded enhancements have applied a similarly rigorous standard and have considered the public benefit created by a lawsuit. For example, in *Hyatt v. Apfel,* the Fourth Circuit upheld an enhancement because the plaintiffs "succeeded in bringing about fundamental change to a recalcitrant agency," the challenged policy affected the determination of hundreds of thousands of disability claims, and the government promulgated new national regulations in response to the litigation. 195 F.3d 188, 191-92 (4th Cir. 1999). Furthermore, "these results were obtained in the face of monumental resistance on every claim made in this extensive and procedurally tortured class action." *Id.* at 192. In *Shipes v. Trinity Indus.,* the Fifth Circuit held that an enhancement was justified because the case resulted in not only substantial monetary awards to the plaintiffs, but also in "future protection against discrimination in the form of injunctive relief." 987 F.2d 311, 322 (5th Cir. 1993).

Similarly, in this case, plaintiffs' counsel went

above and beyond their ethical duties to their clients, working tirelessly in pursuit of the sweeping reforms that they ultimately obtained. As the district court noted, "the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* The court noted that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to the litigation" than the court had seen in any other case. *Id.* Appropriately, the court sought to compensate counsel for their "unparalleled legal representation" and the "extraordinary level of service to their clients." *Id.*

The district court judge's detailed assessment of the case underscores the extraordinary nature of the attorneys' performance and the exceptional quality of the results obtained. These findings justify the upward adjustment of the fee award in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment of the Eleventh Circuit and hold that, under Section 1988, a lodestar estimate may be increased to reflect superlative performance that leads to outstanding results, and that the increase awarded in this case was appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee advocated for the passage of 42 U.S.C. § 1988 and has remained involved in cases addressing the award of attorneys' fees, particularly in the civil rights context.

AARP, a nonpartisan, nonprofit membership organization of nearly 40 million persons age 50 or older, is dedicated to addressing the needs and interests of older people. As the country's largest membership organization, it has a long history of advocating for economic security, access to affordable health care and consumer protections important to the older population and persons with low incomes. AARP has a significant interest in this case. The issue before the Court directly affects the ability of AARP members and other older Americans to secure legal representation to redress harm resulting from, among other things, discrimination, improper institutionalization, crime, physical and emotional abuse, neglect, intimidation and financial exploitation. Court awards of attorney fees are essential to ensure adequate representation of persons harmed in the marketplace. Both AARP Foundation Litigation and AARP Legal Counsel for the Elderly,

AARP affiliated 501(c) (3) organizations, rely on such fees to augment the cost of their advocacy services to the public. The ability of the Court to adjust fee awards in civil rights cases when the quality of the lawyers' performance is superb and the results they obtain are exceptional is critical to older persons and those with limited incomes who otherwise would not be able to secure legal representation.

Alliance for Justice is a national association of over 80 organizations dedicated to advancing justice and democracy. We believe all Americans have the right to secure justice in the courts, including full and fair compensation to redress harms suffered. Many of our member organizations may be negatively affected by the Court's decision in this case. These organizations provide legal representation to a wide variety of clients, including minorities, poor persons, consumers, women, children, and persons institutionalized in mental health facilities who have traditionally lacked the resources to obtain representation to vindicate their legal rights. Because of this, Alliance for Justice actively participated in the passage of 42 U.S.C. § 1988 and has since remained committed to robust attorneys fees awards.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU and its affiliates throughout the country frequently represent clients seeking to vindicate their rights under federal fee-

generating statutes. The proper interpretation of those statutes is therefore a matter of significant interest to the ACLU, which has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy, and education. MADLEF's mission includes a commitment to ensure equal opportunity in education, employment, access to public resources, voting rights, and to promote sound immigration policies. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous civil rights cases, and has been involved in cases addressing the award of attorney fees in civil rights cases.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN

supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. The P&A for the State of Georgia is a member of NDRN.

The National Partnership for Women & Families is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to strengthen civil rights laws and enhance the enforcement of those laws; the provision of reasonable attorneys' fees to the private attorneys who represent plaintiffs in civil rights cases is essential to that work.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity in education and in the workplace for women and girls through full enforcement of constitutional rights, Title IX and Title VII. The award of reasonable attorneys' fees, including the possibility of an enhancement, is important to the achievement of the NWLC's goals.

Appendix

Established in 1910, the National Urban League is the nation's oldest and largest community- based movement devoted to empowering African Americans to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are over 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than two million people nationwide through programs, advocacy, and research. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. The Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through job training, good jobs, homeownership, entrepreneurship and wealth accumulation and promoting and ensuring our civil rights by actively working to eradicate all barriers to equal participation in the all aspects of American society, whether political, economic, social, educational or cultural. The National Urban League is interested in this case because the Court's decision in this matter has the potential to erode the ability of African Americans and other disadvantaged groups to enjoy the full protections and benefits of our nation's civil rights laws. Our nation has made great strides in correcting the past injustices and discrimination. Now is not the time to turn back the clock.

Appendix

Public Citizen is a nonprofit, consumer-advocacy organization founded in 1971, with approximately 100,000 members nationwide. Through its Litigation Group, Public Citizen litigates a wide range of public interest cases under statutes with fee-shifting provisions, including cases under civil rights statutes, the Freedom of Information Act, and the Administrative Procedure Act. Public Citizen has represented parties or filed amicus briefs on attorney fee issues in a number of cases, including *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 553 U.S. __ (2008); *Sole v. Wyner*, 551 U.S. __ (2007); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

AMICUS CURIAE BRIEF

No. 08-970

In The Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTEREST OF AMICI CURIAE[1]

Liberty Legal Institute – Liberty Legal Institute is a legal organization devoted to the defense of religious freedoms and First Amendment rights, representing individuals and institutions across the country. The Institute is committed to the principals of limited government, robust protections of constitutional freedoms and government accountability. The Institute has considerable experience in civil rights litigation, including argument and numerous appearances before this Court, and is greatly concerned with the potential threat this case poses to the nation's privatized system of civil rights enforcement.

American Center for Law and Justice – The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys appear frequently before this Court representing either parties or amici. The Chief Counsel for the ACLJ has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, No. 07-665. ACLJ attorneys often litigate civil rights cases in which the prevailing party is entitled to an award of attorney fees under Section 1988.

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[1] All parties consented to the filing of this brief. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Cato Institute – The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files amicus briefs with the courts. This case is of central concern to Cato because it highlights the importance of properly compensating those who take great risk to enforce our civil rights and of harnessing market principles to promote lawful government behavior.

Institute for Justice – The Institute for Justice (IJ) is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice. Like the other amici, IJ on occasion seeks to recover attorney fees under 42 U.S.C. § 1988 when it successfully defends the rights enshrined in the United States Constitution.

Liberty Counsel – Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as

the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has affiliate attorneys throughout the country. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. Liberty Counsel provides representation at no charge. In many cases, the clients represented by Liberty Counsel would otherwise not be able to seek redress for their grievances. The fee recovery provisions, including the fee enhancement provisions of 42 U.S.C. § 1988 are of critical importance to Liberty Counsel's ability to continue to provide representation to those seeking to halt unconstitutional conduct. It respectfully submits that its perspective on this issue will aid this Court's determination of this important issue.

Alliance Defense Fund – Alliance Defense Fund (ADF) is a national not-for-profit public interest organization that litigates civil rights cases and provides strategic legal planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF attorneys function as private attorneys general, representing clients to vindicate their constitutional rights. The ability to recover attorney fees via the fee shifting provisions of 42 U.S.C. § 1988 enables ADF to stretch its donor dollars to defend the rights of more Americans. ADF attorneys have also observed that the prospect of liability for attorney fees often motivates government

actors to "do the right thing" and promptly resolve matters where the constitutional mischief is obvious.

ADF has advocated for the rights of Americans to exercise their religious beliefs and to express those beliefs in our society, and has handled over 3300 legal matters and 370 lawsuits, including involvement in cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000).

James Madison Center for Free Speech – The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous

election-law cases, including the challenges to the Bipartisan Campaign Reform Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

INTRODUCTION

In order to enforce civil rights guaranteed by the Constitution and by statute, Congress had two principal choices. As the representatives of the American taxpayers, Congress could authorize a massive expansion of the Department of Justice to cover all civil rights cases. It could, alternatively, privatize the system and allow free market principles to encourage private attorneys to undertake the massive effort of private attorneys general, holding government power accountable to the citizen-taxpayers. The former would require Congress to raise the taxes on all Americans to support a vast government bureaucracy charged with enforcing the civil rights of all, while the latter would require civil rights offenders to bear the burdens of their own actions. Congress could, with the former, disperse the cost of freedom across the entire nation, or, with the latter, force civil rights violators themselves, such as cities and states, to be accountable to their own constituencies for lightening the civil coffers with the discretionary attorney fees liability that accompanies the finding of a civil rights violation.

Congress chose to privatize the system, provide market incentives to private attorneys to enforce civil rights, and subject government to the proverbial "invisible hand" of local taxpayers to hold elected representatives responsible for the waste of taxpayer dollars lost in defense of legitimate civil rights violations. *See* Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 456 (Roy Hutcheson Campbell et al. eds., Liberty Fund Glasgow 1981) (1776). In short, Congress, by enacting Section 1988, harnessed free market principles to incentivize lawful government behavior, and justifiably so. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1090 (2007) ("This private enforcement system decentralizes enforcement decisions . . . and helps insulate enforcement from capture by established interests. It is also less expensive for taxpayers. . . ."); George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259, 2274-75 (1994) (finding that "[t]raditional comparisons of the market to political organization have conceded the superiority of the market in terms of both wealth creation and the *maximization of individual liberty*") (emphasis added).

Thus, every time an attorney successfully navigates the heavily mined waters of civil rights litigation – including immunity defenses, mootness issues, and lack of respondeat superior liability – to find his

attorney fee request being reduced by a court for some reason or another, there is some erosion of the free market principles upon which rests the privatized enforcement of civil rights. That is not to say that attorney fee awards must always be robust. But it is important to note that when a court is addressing an attorney fee award, it is because the civil rights plaintiff suffered and proved a civil rights violation – a difficult task for even the most accomplished attorney.

Suffice it to say, attorney fees are not merely about compensating attorneys who undertake the representation of those oppressed and damaged by government, often at significant risk to their regular practice. Just as important, and possibly more so, they provide the incentive for governments, especially with the outcry of local taxpayers upon the media announcement of an attorney fee judgment, to reform their unlawful conduct and refrain from civil rights violations in the future.[2]

This case is about a civil rights fee enhancement. More importantly, however, it is an opportunity to solidify the market based incentives and free

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[2] In addition, because school districts, counties, cities and other political sub-divisions are usually insured by an insurance carrier common to many other government entities, attorney fee awards, especially those with enhancements, serve to motivate the insurance carrier to notify all of its clients to reform their unlawful practices to conform to the ruling and avoid future insurance losses.

enterprise principles that undergird the private enforcement of civil rights laws to ensure actual violations are cured as soon as possible, reducing needless waste of scant judicial resources and saving American taxpayers untold millions of dollars.

SUMMARY OF THE ARGUMENT

As is clear from the legislative history, the American taxpayers, through their representatives in Congress, intended upward fee enhancements in certain cases, and the present case certainly qualifies. This was an exceptionally complex civil rights case involving multiple plaintiffs, multiple defendants, a vast quantity of discovery and many moving pieces. Amici have litigated numerous civil rights matters involving complex legal issues and extensive facts, but few cases compare to this one. The very idea of litigating such a case is daunting, and the actual execution even more so.

From the outset, counsel for plaintiffs attempted, without success, to bring a rapid resolution to the case by seeking expedited discovery and an early preliminary injunction. Due, however, to the government's "strategy of resistance against efforts to reform a foster care system that even [it] ultimately admitted was badly in need of reform" and its excessive delay tactics that "undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were *required* to

incur," *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006) (emphasis added), seven years later the case rages on. This case, as with almost all civil rights cases, was never about financial gain – at least not that of plaintiffs or their counsel. It was about providing an adequate remedy to ensure the government permanently ceased blatant civil rights violations. And yet, for all the reform plaintiffs' counsel have provided, the changed lives of thousands of children in foster care in the State of Georgia and 30,000 hours of work, the government defendant now seeks to avoid the consequences of refusing to settle much earlier in the litigation when its violations were known and clear. More than that, it hopes to eliminate a major incentive – possible enhancement of fees – that works as an additional incentive to encourage government entities to resolve clear civil rights violations early and expeditiously.

ARGUMENT

I. The American Taxpayers, Through Their Elected Representatives, Clearly Endorsed Attorney Fee Enhancements When Enacting Section 1988.

The arduous, precarious and often sacrificial endeavor of civil rights litigation was well known to Congress when it enacted Section 1988. Congress was aware of the "gap between citizens and government officials" due to the "substantial resources" available to government that cause an "inequality of litigating

strength." H. REP. NO. 94-1558, at 7 (1976). Though civil rights litigation was recognized as "equally complex" and thus costly and time consuming as any "antitrust cases," S. REP. NO. 94-1011, at 6 (1976), Congress understood

> [t]he lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case. For there is [sic] often important principles to be gained in such litigation, and rights to be conferred or enforced, but just as often no large promise of monetary recovery lies at the end of the tunnel.
>
> . . .
>
> Even with the enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingency fee case. His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears.
>
> Even if he wins his case, and the judge decides he has won a fee as well, his rate of compensation is fixed not by a grateful client, but by a disinterested judge.

122 CONG. REC. 33314 (1976) (statement of Sen. Kennedy).

The corresponding legislative history of Section 1988 is short, clear and instructive. It establishes that in setting the standard for determining a

reasonable fee under the Act, Congress "create[d] no startling new remedy" but merely "provide[d] the fee awards which are necessary if citizens are to be able to effectively secure compliance" with the civil rights laws. S. REP. NO. 94-1011, at 6. To avoid the creation of a new remedy, or even the appearance of one, Congress chose five model cases from the federal courts that "correctly applied" the "appropriate standards" for awarding fees to successful civil rights litigants in order to set the standards for determining "reasonable counsel fees" and illustrate how those standards are properly applied under Section 1988.[3] S. REP. NO. 94-1011, at 6; H. REP. NO. 94-1558, at 8 (internal quotation marks omitted). Congress was clear that the standards as applied in these cases result in "reasonable fees" "which are adequate to attract competent counsel" but "do not produce windfalls to attorneys." H. REP. NO. 94-1558, at 8; S. REP. NO. 94-1011, at 6.

As even petitioners begrudgingly admit, Pet. Brief at 22 n.11, two of these five cases expressly chosen by Congress to set the standard for awarding fees under Section 1988 awarded upward adjustments to the lodestar amount, and did so for the very

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[3] *United States Steel Corp. v. United States*, 519 F.2d 359 (3d Cir. 1975); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974), 1974 U.S. Dist. LEXIS 8204; *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974). *See* H. REP. NO. 94-1558, at 8; S. REP. NO. 94-1011, at 6.

same reasons at issue in this case. In *Stanford Daily v. Zurcher*, the court calculated and awarded the lodestar amount only after it reduced the requested hourly rate. Once the lodestar was established, the court awarded plaintiffs an upward adjustment in fees of almost 27% of the lodestar amount. 64 F.R.D. 680, 685, 688 (N.D. Cal. 1974). The court's express reasons for this substantial enhancement of the lodestar were the "contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation." *Id.* at 688. In *Davis v. County of Los Angeles*, the court cut the hours billed submitted by plaintiffs' attorneys prior to calculating the lodestar and then cut the lodestar itself for duplication of effort. Only then, as in *Stanford Daily*, did the court award a substantial upward adjustment to the lodestar amount. 8 E.P.D. ¶9444 (C.D. Cal. 1974), 1974 U.S. Dist. LEXIS 8204 at *2-3. And again, as in *Stanford Daily*, the upward adjustment of the lodestar was expressly due to the excellent results achieved by plaintiffs' attorneys, the difficulty of the case and the quality of the representation. *Id.* at *3-4.

Congress had many cases from which to choose to illustrate the standards for determining attorney fees under Section 1988 and their proper application. It chose a total of five. Two of these expressly provided for and approved of substantial upward adjustments to the lodestar due expressly to quality of performance and results obtained. In the absence of express evidence to the contrary, there would seem

little room to quibble whether Congress endorsed these upward adjustments and the specific reasons for them.[4]

It would, then, appear obvious that upward adjustments to the lodestar for quality of performance and results obtained were understood and endorsed by Congress from the genesis of Section 1988. In considering attorney's fees, Congress found that "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." S. REP. NO. 94-1011, at 6. As evidenced by the model cases cited by Congress as the primary guidance for awarding attorney's fees, the possibility of discretionary upward adjustments to the lodestar due to quality of performance and results obtained is a central tenet of this "traditionally effective remedy."[5] With such clear

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[4] Accordingly, petitioner's contention and corresponding argument that "it would be incongruous to attribute much weight" to these cases must be met with a fair amount of incredulity. *See* Pet. Brief at 24. This is particularly so when the statement is made in an attempt to differentiate Congress' use of these cases both to illustrate the standards of calculating attorney's fees and the proper application of those standards from Congress' desire to avoid fee windfalls to attorneys. To the contrary, these very cases were chosen by Congress in part because the standards applied "do not produce windfalls" to the prevailing attorneys. S. REP. NO. 94-1011, at 6.

[5] This Court expressly rejected the "argument that an upward adjustment to an attorney's fee is never appropriate under §1988." *Blum v. Stenson*, 465 U.S. 886, 901 (1984).

and unmistakable illustration of legislative purpose, to find against these same upward adjustments would be in direct contravention to the goals and purposes of Congress in enacting Section 1988. Overturning the clear and lawful purpose of the legislature would be inappropriate; it would also remove a major incentive for the government to seek early resolution of civil rights violations, an incentive necessary to prevent increased waste of judicial resources and a greater burden on taxpayers.

II. Reducing Or Eliminating The Enhancement Will Lead To More Waste Of Judicial Resources And A Greater Burden On American Taxpayers.

The government is no ordinary defendant. It does not bear the same level of responsibility expected of the private sector, such as respondeat superior liability. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Most importantly, government defendants are not subject to normal market principles regarding a cost-benefit analysis of litigation. Citizens raising families, working jobs and paying bills do not watch government as closely as shareholders or stakeholders in private enterprise. A local school district can spend a million dollars fighting a child who wants to hand a candy cane with a religious poem attached to his friends during Christmas, and then hold media events expressing a need for money for education. Few private enterprises would ever spend any amount of money fighting candy canes, and those

that did would probably cease to exist. Not so for government. Government has few natural financial boundaries – it can always generate new revenue. The free market incentives provided when Congress elected to privatize civil rights enforcement, including possible fee enhancement, serve to create the government accountability needed for a privatized system to achieve maximum benefits for citizens, reduce waste of judicial resources, and save taxpayer money.

A. Post-*Buckhannon* civil rights litigation tends to waste valuable judicial resources and taxpayer money, a deficiency upholding potential enhancement to attorney fees would help remedy.

In post-*Buckhannon* civil rights litigation, there is reduced incentive for an offending government entity to seek speedy and robust resolution of civil rights disputes. Albiston, *supra*, at 1133 (concluding the post-*Buckhannon* empirical data shows *Buckhannon* "removes a significant incentive for early settlement" by the state). While petitioners assert that an upward adjustment to the lodestar serves to discourage government entities from settling civil rights disputes, the reality is quite the contrary. The possibility of fee enhancement, though rare, provides additional incentive in the wake of *Buckhannon* for government to seek early resolution of a civil rights dispute.

Buckhannon requires civil rights plaintiffs to obtain a judgment or consent decree signed by the

Court in order to obtain an attorney fee award. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Prior to *Buckhannon*, the catalyst theory of discretionary attorney fees provided strong incentives to both the plaintiff and the government to resolve civil rights disputes immediately upon the filing of the case and come to the negotiating table in good faith. The government could revise its policies or practices or take actions necessary to remedy the violation and then settle the dispute for the limited amount of attorney fees associated with filing the case. The plaintiff would be satisfied without a judgment signed by the court to enforce the government's change of heart, as the payment of the attorney fees, even if minimal, represented an effective warning for the government not to return to its former unlawful course of action.

Buckhannon altered this balance of incentives. Without the restraint of the catalyst theory, government now has a perverse incentive to vigorously defend even the most blatant civil rights violations in an effort to drain the pro bono counsel for the plaintiff of time and resources and possibly end the case without a decision. If the government is successful, the plaintiff is forced to withdraw from the case for lack of resources. If its efforts to discourage the plaintiff from continuing are ineffective, no matter over how many months or years, the government may simply change its position and moot the case prior to the court arriving at a judgment. Albiston, *supra*, at 1133 (following *Buckhannon*, a "state may feel free to

allow litigation to drag on and on, confident that strategic capitulation will protect it against an adverse judgment and a fee award."); *id.* at 1091 (the catalyst theory "prevented a litigation maneuver that we call strategic capitulation. By strategic capitulation we mean situations in which defendants faced with likely adverse judgments attempt to moot the case and to defeat the plaintiff's fee petition by providing the requested relief before judgment."). The litigation ends without permanent resolution, leaving the plaintiff with the mere promise to reform by the same government entity that thought nothing of violating his civil rights before. Plaintiff's counsel has no hope of recovering any compensation for his time, and the government, free of court order or settlement agreement, has the freedom to return to its unlawful behavior in the future.

In this case, counsel for Plaintiffs filed suit in 2002 and sought rapid resolution of a major claim through a preliminary injunction, the preferred method of litigating a civil rights case in a post-*Buckhannon* world.[6] Unfortunately, defense counsel deployed delay tactics in the discovery process, prompting judicial intervention to ensure compliance with the rules. The district court held a hearing for the preliminary injunction and made a significant but understandable error – despite realizing there was

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[6] Preliminary injunctions provide a low cost, judicially efficient method of resolving civil rights cases and, at least in most circuits, help bring finality to the dispute and provide for the lowest anticipated attorney fee recovery.

a violation, it showed deference to the government defendant. Although the court found that the government was in violation of basic rights of abused and neglected children in its care, the court nevertheless denied the injunction because the government promised to reform.[7]

What ensued was a post-*Buckhannon* government "strategy of resistance against efforts to reform a foster care system that even [the government defendants] ultimately admitted was badly in need of reform." *Kenny A.*, 454 F. Supp. 2d at 1296. Though well aware of its unlawful and destructive practices regarding the foster children in its care, as evidenced by its sweeping concessions in the consent decree, the government nonetheless filed an extensive motion to dismiss followed by a massive motion for summary judgment and even a *Daubert* motion to exclude the reports and testimony of *all* of plaintiffs' experts.[8] Not content to flood the docket with a vast motions practice, the government resorted to scorched earth

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[7] Holding the government accountable for the unlawful activity challenged by the preliminary injunction motion would have been a tremendous aid in settling the case early on by reducing the government's incentive to continue its defense knowing plaintiffs had prevailed such that they could petition the court for attorney fees for their efforts up to that point in the litigation. This would have helped bring the government to the negotiation table at the start of the litigation in much the same way the catalyst theory once did. Failing to hold the government accountable for admittedly unlawful behavior only emboldened the government to wage a years long drawn-out defense, which it did.

[8] Each motion was denied by the district court.

tactics and "s[ought] repeatedly to limit plaintiffs' discovery efforts." *Kenny A.*, 454 F. Supp. 2d at 1266. At one point the district court was actually forced to admonish the government for "relying on technical legal objections to discovery requests in order to delay and hinder the discovery process." *Kenny A.*, 454 F. Supp. 2d at 1268 (quoting Dist. Crt. Order of January 7, 2003, at 4). The government's tactics were so blatant and extensive that the district court directly referenced them no less than five times in its opinion. *See Kenny A.*, 454 F. Supp. 2d at 1266, 1268, 1277, 1279, 1296. There can be little credible question that this scorched earth "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were *required* to incur." *Kenny A.*, 454 F. Supp. 2d at 1266 (emphasis added).

With no preliminary injunction and faced with nearly three years of litigation and half a million pages of documents, the district court ordered mediation. The parties, three years and a half million pages of record later, agreed to terms in the consent decree that awarded plaintiffs substantially all the relief originally requested. The post-*Buckhannon* disincentive[9] for government to seek early resolution of civil rights violations cost the people of Georgia not merely the fees reasonably due the plaintiffs but also

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[9] Petitioners obviously did not believe upward fee adjustments were possible, as evidenced by their appeal, and thus the normal incentive of a possibility of upward adjustments encouraging early resolution was lost.

the outrageous sum of $2.4M paid by their government to hire attorneys to defend the unlawful practices to which the government eventually admitted.

Such waste of judicial resources and taxpayer money has become more common in post-*Buckhannon* civil rights litigation. Albiston, *supra*, at 1133. Predictably, the government chose to gamble that it could survive the litigation and employ a massive defense without ever being held accountable for its actions. It confessed error early on and avoided the preliminary injunction, with the court relying on its promise to reform instead of enjoining it. It then proceeded to use every instrumentality available to drain plaintiffs of their resources and discourage them from continuing with the case, resisting the "reform [of] a foster care system that even [it] ultimately admitted was badly in need of reform." *Kenny A.*, 454 F. Supp. 2d at 1296.

Many such cases currently clog the dockets of district courts across the country and will continue to burden limited judicial resources unless the government has the necessary incentive to seek resolution at the early stages of litigation. Eliminating incentives, such as fees and their possible enhancement, that encourage early settlement is not only a rejection of Congress' purpose but also a step leading to more waste of taxpayer and judicial resources.

B. Reducing or eliminating the enhancement awarded in this case will disserve the American taxpayers.

"[P]etitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner." *Riverside v. Rivera*, 477 U.S. 561, 581 n.11 (1986). In the private sector, there are natural incentives for businesses to disengage when they have violated the law and the cost-benefit analysis of a massive defense demonstrates that early settlement or acquiescence is less costly than prolonging the inevitable when plaintiffs present legitimate claims. No such natural incentives exist for government. The State of Georgia, well aware of its unlawful treatment of the children in its care, hired some of the best attorneys it could find to defend this unlawful behavior. To avoid an early preliminary injunction and any other form of judicial relief qualifying plaintiffs as prevailing parties (thus entitling them to fees far less than finally recovered), the Georgia taxpayers were forced to pay $2.4M to outside defense counsel. While the district court properly noted that the outside counsel for the government cut their hourly rate in half, this rate was no noble act of benevolent service to the state. It is normal practice for private attorneys working for a government entity to charge a low market rate as payment is guaranteed and work is plentiful. That is not the case for private civil rights counsel.

There are very few full time civil rights plaintiff's attorneys in the country, due largely to the economic hindrances the government's preferred defendant status and the uncertainty of payment present any who would hold the government accountable to the law. Most attorneys who represent civil rights plaintiffs are solo practitioners and "local, small-firm lawyer[s]" who must be able to obtain attorney fees in order to take a case. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 767-69 (1988); *see also* Carl Tobias, *Rule 11 & Civil Rights Litigation*, 37 BUFF. L. REV. 485, 486 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income."). Accordingly, for most a full time civil rights practice is simply not economically feasible. Most attorneys representing citizens against overreaching governmental entities are thus taking on a case that necessarily interferes with their regular legal practice.

There are, however, thousands of professional civil rights *defense* attorneys whose firms make millions of dollars defending government entities, and many, if not most, government entities are represented by them. For these attorneys, their entire firm or practice group within the firm is dedicated to defending civil rights cases for government. The more protracted the litigation and the greater the girth of

the docket, the greater their economic success. In a post-*Buckhannon* world, this has led to a substantial increase in the size of the dockets and records in civil rights cases. Albiston, *supra*, at 1130 ("[O]ur *qualitative data* suggest that, rather than promoting settlement at minimal cost to enforcement efforts, *Buckhannon* both *prolongs existing litigation* and discourages public interest organizations from taking on future enforcement actions." (emphasis added)).

Considering the lack of incentive that normal civil rights recoveries offer an attorney to represent a civil rights victim, along with the perverse incentives for an attorney defending the government, and the government itself, to engage in a long, protracted defense, Congress was wise to provide the possibility of an upward adjustment of fees to offer an additional incentive for earlier resolution. Additionally, winning cases against a government defense approach of attrition is more likely than normal to lead to the unusual case where a truly "reasonable" fee merits upward adjustment. Enduring a half million pages of discovery and motions requires extraordinary commitment and extraordinary work, especially if achieving extraordinary results.

In sum, civil rights attorneys representing damaged citizens bringing legitimate claims desire expeditious and frugal methods to resolve cases. Non-profit organizations such as amici and private attorneys seeking to benefit the community do not desire to expend a decade's worth of financial resources on one case. They seek early resolution out of

economic necessity. Private attorneys employed by government and guaranteed monthly payment for all their hours worked have no such incentive to urge their clients toward an early resolution. They have, instead, significant incentives to prolong litigation, both to increase their own income and drain the comparatively meager resources available to counsel seeking to rectify a civil rights violation. The solution most compatible with a privatized system of enforcement is to provide the government incentives to early resolution of civil rights violations commensurate with that of civil rights victims. Congress did exactly that in passing Section 1988, guaranteeing a truly reasonable recovery specifically including the possibility of enhancement of fees.

C. A privatized system of enforcement requires adequate incentives to encourage speedy and robust resolution of civil rights violations.

The enhancement awarded by the district court is substantial, and it should be. Georgia was always in the driver's seat regarding the size of the attorney fee award in this case, and engaged in a "strategy of resistance [that] undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Kenny A.*, 454 F. Supp. 2d at 1266. If the Court upholds the enhancement, it will save American taxpayers millions of dollars in future litigation expenses and judicial resources.

Most Georgia taxpayers are probably unaware of the facts of this case or the conditions these children were forced to endure. They will, however, be made very aware of the size of the attorney fee award. They will demand answers. They will demand fiscal accountability and that the government behave responsibly. Georgia, in the future, will be somewhat leery of paying $2.4M to outside counsel plus an enhanced attorney fee judgment to defend known civil rights violations merely to avoid paying a fraction of that amount to reform and settle with the victims early on. Georgia, and other government entities, will begin to reconsider the false post-*Buckhannon* strategy of government delay and obfuscation and will engage instead in some cost-benefit analysis reminiscent of the private sector. In short, in any future civil rights violations for which Georgia realizes it is responsible and must remedy, it will work to resolve the dispute as early as possible in the litigation to avoid the needless ballooning and possible enhancement of the attorney fee award. This possibility of enhancement will merely serve to realign the incentives for government to approach civil rights violations with the same desire for early resolution as the victims themselves.

Upholding the enhancement will also send the message that others gambling with American taxpayer dollars defending civil rights violations through a strategy of attrition could face a steep penalty in cases where civil rights claims finally prevail. The American taxpayers deserve incentives to drive both

parties to the settlement table early on in the litigation, not only to reduce both the amount of attorney fees paid to government counsel and to the civil rights plaintiff presenting a legitimate claim, but also to encourage ending ongoing violations as quickly as possible.

Publicly scourging the winning attorneys over fees properly recovered for a hard-won victory is not helpful. Attorneys for civil rights plaintiffs already have every incentive to reduce their commitment of time and resources in the risky endeavor of a civil rights case. The probability of success is very low. Courts generally show deference to government defendants. Governments enjoy preferred defendant status over private institutions, including immunity defenses and no respondeat superior liability. Even payment for services rendered is uncertain and subject to a level of scrutiny unheard of in the normal private sector: upon victory, the prevailing attorneys are subjected to attacks on all their hours, rates and bills by the very attorneys they just defeated.

Not surprisingly, the "competent counsel" Section 1988 expressly was intended to attract are highly encouraged to go elsewhere. *See Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned. . . ."). The attorney for the citizen seeking merely to enforce the law toils often for years without payment and with very low odds of recovering even a substantial portion of the time and

resources invested in a public service. On the other side, private attorneys representing the government are paid in full and on time, usually at the end of each month's work. The longer the case proceeds, the greater the burden on the attorney representing the citizen and the greater the financial reward for the private defense attorney. The potential of fee enhancement provides the counterbalancing incentive needed to attract the "competent counsel" required by this system of privatized enforcement, as Congress clearly intended. *See, e.g.*, 122 CONG. REC. 33313 (1976) (remarks of Sen. Tunney) ("If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.").

The enhancement in this case will certainly give governments pause before they engage in an unnecessarily protracted or scorched earth defense. There is no good reason for a government to squander $2.4M to mount a protracted defense of a course of conduct it well knew was unlawful and wrong. It is that $2.4M that is the truly shocking figure in this case, especially so when considering the only reason this case settled at all is because the district court essentially ordered settlement to stop the fee hemorrhaging. Even then, the government spent an incredible amount of money over the course of 110 hours of mediation to simply acquiesce to substantially all the relief originally requested by the victims.

The most effective, and perhaps the only, way to prevent the similar government abuse of taxpayer resources represented by this case and hundreds of others currently on the federal dockets is to uphold the possibility of fee enhancement. These plaintiffs took on a heavily entrenched government defendant in a legally and factually complex case and endured a vigorous scorched earth defense, which caused the fees on *both* sides to grow. Plaintiffs attempted quick and inexpensive resolution of the case early on only to have the government repeatedly thwart their efforts. Georgia and hundreds of other government defendants represented by private attorneys paid by the hour need an incentive that levels the playing field in a post-*Buckhannon* world to motivate them to similarly seek early resolution to legitimate civil rights violations. The potential of increasing fees and a discretionary upward adjustment of the lodestar provides just that.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-970

IN THE

Supreme Court of the United States

SONNY PERDUE, Governor of Georgia, *et al.*,
Petitioners,

v.

KENNY A., By His Next Friend Linda Winn, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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August 28, 2009

QUESTION PRESENTED

Can an attorney's fees award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than six decades. LDF litigated key cases that developed the legal framework for attorney's fees awards in civil rights cases, and that were incorporated into the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988). *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975); *see also Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 54 (1975) (statement of Rep. Drinan) (citing LDF's reliance on the availability of attorney's fees awards to litigate civil rights cases).

LDF has also participated as an amicus in cases before this Court interpreting the scope of reasonable attorney's fees provisions in various federal statutes. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

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[1] Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties are lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Effective civil rights laws are vital to the health of our democracy. But even the best statute is essentially a dead letter without vigorous enforcement. Congress was well aware of the dangers of underenforcement when it passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988) [hereinafter Section 1988]. It was Congress's reasoned determination that robust attorney's fees awards, including enhancements for extraordinary performance and results, would provide a much-needed catalyst to encourage citizens to pursue the types of litigation that most boldly defend and enhance civil rights. This case presents no occasion for the Court to displace Congress's well-considered judgment.

Section 1988 was Congress's swift and decisive response to a decision of this Court that prohibited attorney's fees awards absent express statutory authorization. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). A little over a year after *Alyeska* was decided, Congress overcame a Senate filibuster and enacted Section 1988, which authorizes "a reasonable attorney's fee" for prevailing litigants under an array of civil rights laws, including 42 U.S.C. §§ 1981, 1982, and 1983.

This brief supplements Respondents' analysis of Section 1988's legislative history in three distinctive ways. First, Section 1988 does more than simply provide access to the courts for plaintiffs seeking redress for individual wrongs. Congress also sought to promote *vigorous* and *effective* civil rights enforce-

ment. To achieve this broad-reaching objective, Congress adopted an expansive view of what constitutes a reasonable attorney's fee. In no way did Congress intend to restrict fees awards to the "lodestar" calculation that results from multiplying the number of hours an attorney worked by a reasonable rate for his or her services. Rather, Congress gave clear direction that enhancements above the lodestar are permitted in exceptional circumstances for extraordinary performance and results that forcefully advance civil rights.

Second, the legislative history emphasizes the symmetry between Section 1988 and Congress's simultaneous enactment of a statute that filled another gap created by *Alyeska*. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396 (codified as amended at 15 U.S.C. § 26) [hereinafter Antitrust Improvements Act], provided for reasonable attorney's fees in certain antitrust cases. Congress determined that courts should have the same power to grant enhancements to promote vigorous civil rights enforcement and to encourage the efficacious implementation of antitrust policy.

Third, in 1976, when Congress was considering Section 1988, it rejected an amendment that would have done exactly what Petitioners urge. It is an established principle of statutory construction that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded. Moreover, subsequent Congresses have confirmed the importance of enhancements by repeatedly rebuffing legislation to curtail or ban them.

After highlighting these distinctive features of the legislative history, this brief surveys cases decided after the enactment of Section 1988. Contrary to the assertions of Petitioners and their amici, courts have proved adept at crafting workable criteria for determining the rare circumstances in which enhancements for extraordinary performance and results are warranted to promote vigorous enforcement of civil rights. Courts have found it reasonable to enhance fees in cases that set important precedents or otherwise pave the way for future federal and private enforcement, recognizing that these cases require the greatest degree of ingenuity, and thus the number of hours an attorney works are less likely to reflect the true value of his or her services. In addition, courts have granted enhancements in cases that do not merely remedy violations of an individual's rights, but provide broad-reaching relief that roots out entrenched discrimination or eradicates systemic inequities.

ARGUMENT

I. Section 1988's legislative history demonstrates that Congress intended to permit enhancements for extraordinary performance and results that vindicate civil rights.

This Court has repeatedly relied upon legislative history in the interpretation of statutory terms that are not clear on their face. The "reasonable attorney's fee" language in Section 1988 is no exception. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 893-97 (1984). This section highlights three distinctive aspects of Section 1988's legislative history that are

not addressed in Respondents' brief. Close review of the legislative history confirms that the availability of enhancements was part of a deliberate congressional determination that civil rights enforcement should be vigorous, incentivized, and compensated on terms no less favorable than in other substantive areas where enhancements have long been granted to further key national priorities.

A. It was Congress's well-considered judgment that Section 1988 should provide significant incentives for vigorous and effective civil rights enforcement.

1. While Section 1988 ultimately passed by broad margins in both the House and Senate, *see* 122 Cong. Rec. 33315, 35130 (1976), the process preceding the vote reveals significant deliberation and intense debate—an illustration of Congress's carefully considered judgment. Indeed, proponents had to devote extraordinary resources to bring the legislation to a vote. The Senate approved Section 1988 after a cloture vote ended an unusually hard-fought filibuster. *Id.* at 32172. In the House, proponents utilized a procedural maneuver reserved for "emergency" legislation to ensure prompt consideration. *Id.* at 35118, 35119.

Congress thought these emergency measures were necessary because this Court's decision in *Alyeska* "dealt a serious blow to the effective enforcement of our civil rights laws." 122 Cong. Rec. 31471 (1976) (statement of Sen. Mathias). Fresh from the battles of the initial decades of modern civil rights enforcement, Congress intended its authorization of reasonable attorney's fees awards to do more than

simply provide access to the courts for those seeking redress for individual wrongs. It provided for robust attorney's fees awards as a catalyst for citizens to pursue "vigorous enforcement" of civil rights laws. S. Rep. No. 94-1011, at 4 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911 [hereinafter Senate Report]; H.R. Rep. No. 94-1558, at 2-3 (1976) [hereinafter House Report].

Senator Tunney, the Senate bill's sponsor, reminded his colleagues that "[w]e cannot hope for *vigorous enforcement* of our civil rights laws unless we . . . remove the burden from the shoulders of the plaintiff seeking to vindicate the public right." 122 Cong. Rec. 33314 (1976) (emphasis added) (internal quotation marks omitted); *see also id.* at 31472 (statement of Sen. Kennedy) (Section 1988 will "assure all the citizens of this Nation . . . that Congress firmly intends that all our civil rights laws be *vigorously enforced*." (emphasis added)).[2] A key House proponent aptly summed up Section 1988's broad-reaching objectives: "A vote for the bill is a vote for effective civil rights laws." *Id.* at 35129 (statement of Rep. Seiberling).

2. To achieve these far-reaching objectives, Congress repeatedly recognized the multi-factor test set

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[2] References to the importance of "vigorous enforcement" also feature prominently in subcommittee hearings. *See, e.g., Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 85 (1975) (statement of Armand Derfner, Lawyers' Committee for Civil Rights); *id.* at 122 (statement of Charles R. Halpern, Executive Director, Council for Public Interest Law); *id.* at 285 (recommendation of American Bar Association).

forth in a pre-*Alyeska* employment discrimination case litigated by amicus LDF—*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)—as establishing "[t]he appropriate standards" for determining reasonable attorney's fees awards. Senate Report 6; *see also* House Report 8. The Senate Judiciary Committee further explained that the *Johnson* factors "are correctly applied" in three cases: *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, No. 73-63-WPG, 1974 WL 180 (C.D. Cal. June 5, 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). *See* Senate Report 6.

Congress deliberately chose this trilogy to emphasize its commitment to vigorous and effective civil rights enforcement. As detailed in Part II.A.3 *infra*, all three cases substantially advanced the state of civil rights law. *Davis* and *Stanford Daily* expressly granted enhancements for extraordinary performance and results, and the fees awards in all three cases were among the most robust of the pre-*Alyeska* era. *See Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93rd Cong. 862-1107 (1974) (collecting cases). Because these cases are particularly instructive with respect to the question presented, they merit the same close attention that the Court has devoted to them in prior interpretations of Section 1988. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989); *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality opinion); *Blum*, 465 U.S. at 893-95; *Hensley v. Eckerhart*, 461 U.S. 424, 430-32 (1983).

The legislative history thus refutes Petitioners' assertions that enhancements are unnecessary to achieve the "the clear purpose" of Section 1988. Pet. Br. 19-20. Their view that Section 1988 simply ensures that aggrieved individuals are able to attract the services of "competent counsel" is too narrow. *Id.* at 20. While Congress sought to eliminate unfairness to individuals deprived of their rights who do not have resources to hire an attorney, it also endorsed "the broadest and most effective remedies available to achieve the goals of our civil rights laws." Senate Report 3. Enhanced fees awards for extraordinary representation and results further Congress's broad-reaching objectives by encouraging attorneys to seek cases that will not simply apply well-settled precedents to remedy garden-variety statutory or constitutional violations, but that will also advance the state of civil rights law, dismantle entrenched institutional discrimination, or eradicate other systemic injustices.

B. Congress intended for the same standards to govern civil rights fees awards as apply in antitrust cases, where courts have long awarded enhancements for extraordinary performance and results.

Enhancements for extraordinary performance and results are also consistent with Congress's intent that "the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." Senate Report 6. Respondents aptly demonstrate that, during the period preceding enactment of Section 1988, courts endorsed enhancements for extroardinary performance

and results in antitrust and securities cases, especially those with substantial public benefits. *See* Respondents' Br. 27-31 & n.3 (collecting cases).

For this reason, it is particularly significant that, on the day before Section 1988 passed the House, President Ford signed into law the Antitrust Improvements Act. Like Section 1988, the Antitrust Improvements Act filled a void created by *Alyeska*. As pertinent here, it authorized the award of reasonable attorney's fees for antitrust claims for injunctive relief.[3] H.R. Rep. No. 94-499(I), at 18-20 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2572, 2588-90. As with Section 1988, Congress concluded that reasonable attorney's fees in antitrust cases seeking injunctive relief were "an effective enforcement tool" to advance an important congressional policy objective. *Id.* at 2589.

In the House floor debates regarding Section 1988, Representative Seiberling expressly noted parallels to the Antitrust Improvements Act and observed that "certainly the laws protecting people's civil and constitutional rights are at least as important as are antitrust laws." 122 Cong. Rec. 35118 (1976).

Section 1988's legislative history also contains express reference to *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974), a significant pre-*Alyeska* antitrust case that awarded an enhancement for extraordinary performance and results. *See*

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[3] Congress had previously authorized the award of reasonable attorney's fees for damages claims in antitrust cases. Clayton Antitrust Act, ch. 323, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 15).

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 421 (1975) (reprinting law review article discussing *Arenson*); Respondent's Br. 27 (citing *Arenson*).

The enhancement in *Arenson* was explicitly geared to ensuring vigorous enforcement of key congressional policy objectives in the antitrust context. The district court recognized "the social effect of th[e] litigation," 372 F. Supp. at 1352, noting that: "[a]n entire industry has been restructured" as a result of the suit, *id.*; "[t]his achievement could well be of great instructive precedent in subsequent litigation," *id.* at 1358; and the litigation was "fought out at a legal frontier where no lawyer knew all the answers," with plaintiffs' attorneys "blazing new legal trails," *id.* at 1352-53. The court further observed that "[t]he value of a lawyer's services is not merely measured by time or labor" because "[t]he practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter." *Id.* at 1356.

The enactment of the Antitrust Improvements Act nearly simultaneously with Section 1988 underscores Congress's considered judgment that Section 1988 should permit courts to award adjustments above the lodestar for vigorous enforcement of federal civil rights laws using the same standards applied in other complex federal litigation, particularly antitrust cases. It would be wholly inconsistent with Congress's intent for courts to remain free to grant enhancements for successful antitrust litigation but

not for vigorous civil rights enforcement, which Congress has long considered an equally critical national priority.

C. Congress has repeatedly rejected proposals that would have expressly prohibited enhancements.

1. In 1976, as Congress was debating Section 1988, it considered and rejected alternative language that would have made explicit the factors for setting a fees award and would have precluded enhancements for extraordinary performance and results. 122 Cong. Rec. 31477 (Amendment 470 to S. 2278). Specifically, an amendment from Senator Helms proposed that an attorney's fees award be "based upon the actual time expended by [an] attorney or agent and his or her staff in advising or representing a party (at prevailing rates for such services, including any reasonable risk factor component)." *Id.* at 31477-78.

After careful consideration, Congress rejected the Helms amendment. *Id.* at 31480-81. Instead, Congress adopted the "reasonable attorney's fee" language that it had previously used to ensure vigorous and effective enforcement of other civil rights statutes, including Titles II and VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000a-3(b), 2000e-5(k); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (interpreting the attorney's fees provision of Title VII so as not to "undercut the efforts of Congress to promote the vigorous enforcement" of that key employment antidiscrimination statute). The rejection of the Helms amendment is significant because, as this Court has held, "[f]ew

principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

Petitioners' claim that "the plain statutory language" does not "permit[ ] any type of enhancement to an attorney's fee award," Pet. Br. 13, is therefore incorrect. Section 1988 adopted the "reasonable attorney's fee" language that Congress had long used in prior statutes authorizing fee-shifting for civil rights enforcement, because that language had already been interpreted in a manner that Congress sought to affirm. *See* Senate Report 4 ("It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act."); *Blum*, 465 U.S. at 894 n.10 ("Congress was legislating in light of experience when it enacted the 1976 fee statute."). Indeed, Congress deliberately chose to reinstate the court-created regime employed prior to *Alyeska*, which permitted courts to enhance fee awards for extraordinary performance and results in appropriate circumstances. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) ("It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so.").

2. Post-enactment legislative activity confirms that Congress did not intend for Section 1988 to preclude enhancements for extraordinary performance and results. Congress has adopted several amend-

ments to expand and revise Section 1988's coverage. *See, e.g.*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(b), 110 Stat. 3853; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 4(a), 107 Stat. 1489. Yet Congress has never acted to restrict enhancements for extraordinary performance and results, even though courts, as discussed in Part II.A *infra*, have granted such enhancements during the decades since Section 1988 was enacted. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) (holding that Congress can be assumed to have endorsed—by failing to overturn—a "well-established judicial interpretation").

Moreover, Congress has repeatedly rejected proposals to proscribe enhancements to attorney's fees awards. For instance, as Respondents point out, the Senate considered but opted not to act on legislation introduced in 1984 that would have amended Section 1988 to prohibit enhancements. *See* Legal Fees Equity Act, S. 2802, 98th Cong. § 6(a)(2) (1984); *The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 4-5 (1985); Respondent's Br. 45-46.

This 1984 effort to ban enhancements is only the tip of the iceberg. From 1982 through 1991, similar proposals were repeatedly introduced in the Senate, and at least two subcommittee hearings were held, but none of these bills was ever even voted out of committee. *See* S. 585, 97th Cong. § 722A(e) (1982); Legal Fees Equity Act, S. 1580, 99th Cong. § 6(a)(2) (1985); Legal Fees Equity Act, S. 1253, 100th Cong. § 6(a)(2) (1987); Legal Fees Equity Act, S. 90, 101st

Cong. § 6(a)(2) (1989); Legal Fees Equity Act, S. 133, 102nd Cong. § 6(a)(2) (1991); 131 Cong. Rec. 22346-67 (1985); 133 Cong. Rec. 13556-63 (1987); *see also Attorney's Fees Awards: Hearings on S. 585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 8 (1982); *Legal Fees Equity Act: Hearings on S. 1580, S. 1794, and S. 1795 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 99th Cong. 2 (1986).[4]

Opponents of enhancements tried a different tactic in 1991. They proposed an amendment to the Civil Rights Act of 1991 that would have limited attorneys' fees to 20% of monetary awards. *See* 137 Cong. Rec. 28871-80 (1991). This approach also failed.

By contrast, Congress has explicitly proscribed enhancements in other contexts. In numerous statutory schemes, Congress has capped fees awards.[5]

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[4] In other contexts, Congress has resisted aggressive lobbying by state and local officials to limit enhancements. *See, e.g., Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 550 (1981) (report of National Association of Attorneys General) (proposing that "amounts awarded as attorneys' fees should be limited by Congress to a reasonable hourly rate" and not "awarded based on some 'benefit to the class' or private attorney general theory"); *id.* at 104 (prepared statement on behalf of the National Institute of Municipal Law Officers) (proposing a ban on enhancements).

[5] *See, e.g.*, 28 U.S.C. § 2412(d)(1)(A) and (2)(A) (capping fees under the Equal Access to Justice Act at $125 per hour "unless the court determines that an increase in the cost of living or a

Moreover, a provision enacted by Congress in 1986 to govern attorney's fees for claims brought under the Individuals with Disabilities Education Act explicitly states that "[n]o bonus or multiplier may be used in calculating the fees awarded." 20 U.S.C. § 1415(i)(3)(C). Legislative history reveals that this statutory language was intended to adopt a more restrictive approach than permitted under Section 1988. *See* H.R. Rep. No. 99-687, at 6 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 1807, 1808; Respondents' Br. 18, 45.

Congress's repeated consideration and rejection of efforts to eliminate enhancements during the thirty-two years that Section 1988 has been in force confirms that Congress intended to authorize these incentives to encourage vigorous enforcement, and that it has never chosen to abandon this approach.

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special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"); 28 U.S.C. § 2678 (fees under the Federal Tort Claims Act limited to 20% of an administrative settlement and 25% for fees in cases that are litigated); 42 U.S.C. § 406(b)(1) (fees under the Social Security Act for past-due benefits capped at the lesser of 25% of the award or $4,000); 22 U.S.C. § 277d-21 (fees under the American-Mexican Chamizal Convention Act limited to 10% of the award); 48 U.S.C. § 1424c(f) (fees in claims regarding land under the Guam Organic Act capped at 5% of the award); 50 U.S.C. App. § 1985 (fees under the Japanese-American Evacuation Claims Act limited to 10% of the award).

II. Federal courts have developed workable criteria that reserve enhancements for litigation that substantially furthers Congress's objective of vigorous civil rights enforcement.

Cases that obtain far-reaching results or break new ground for civil rights further the purposes of Section 1988 described in Part I.A *supra* by making a significant contribution to the vigorous enforcement scheme envisioned by Congress. Enhancements for extraordinary performance and results recognize that if private attorneys do not have appropriate incentives to bring such cases, civil rights laws may be under-enforced. Contrary to the arguments of Petitioners and the United States, *see* Pet. Br. 50-51; U.S. Br. 22, courts have developed manageable standards to distinguish the exceptional cases warranting enhancements for extraordinary performance and results that further Congress's broad-reaching goals.[6]

A. Courts have properly limited enhancements to those cases that establish important precedents or achieve broad relief that roots out entrenched inequities.

Courts have developed workable criteria to limit enhancements to the rare and exceptional cases

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[6] Some of the cases discussed below were decided prior to this Court's decisions proscribing enhancements for contingency and certain other factors. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557 (1992). Nevertheless, the reasoning in these cases supporting enhancements awarded for extraordinary performance and results is still valid because the courts considered these factors independently.

where attorneys have achieved results that further the purposes of Section 1988 by promoting vigorous civil rights enforcement. *See, e.g., Hughes v. Repko*, 578 F.2d 483, 488-489 (3rd Cir. 1978) ("We emphasize, as did the Congress that enacted [Section 1988], that the district court should evaluate the fee to be awarded in light of the important substantive purposes of the Civil Rights Act, 42 U.S.C. § 1982 (1970), upon which plaintiffs relied."). Courts have found it reasonable to enhance fees in cases that set important civil rights precedents or otherwise pave the way for future effective federal and private enforcement; or cases that do not merely remedy an individual case of discrimination, but also obtain substantial relief that ends discriminatory policies of large institutions or roots out entrenched inequities.

1. When a civil rights lawsuit resolves unsettled legal questions or creates a new cause of action, the effect of the decision extends beyond that case through the creation of precedent, which furthers the development of the law, creates a foundation for future litigation, and increases voluntary compliance. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 201 ("A private attorney general whose activities produce precedent is thus in some important ways more effective than a private attorney general whose activities produce only local change."); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 611-15 (1992) (describing the costs to the legal system when judicial interpretation is delayed). When attorneys succeed in obtaining such groundbreaking decisions, they have advanced Section 1988's goal of vigorous civil rights enforcement.

In these limited instances, courts have awarded enhancements above the lodestar, recognizing that these cases require the greatest degree of ingenuity, and thus the hours that an attorney works are less likely to reflect the value of his or her services.[7]

For example, the Sixth Circuit found that a successful challenge to entrenched segregation in Tennessee's university system was a "rare and exceptional" case that could meet the high standard for an enhancement. *Geier v. Sundquist*, 372 F.3d 784, 796 (6th Cir. 2004). The *Geier* litigation included the first holding by a federal appellate court that there is "an affirmative duty to remove all vestiges of state-imposed segregation in institutions of public higher education, just as there [is] such an obligation at lower educational levels." *Id.* at 795; *see also Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1065 (6th Cir. 1979).

In its 2004 decision regarding attorney's fees for co-counsel who litigated *Geier* with LDF, the Sixth Circuit determined that the district court had failed to consider sufficiently whether the results obtained in a particular phase of the litigation warranted an enhancement. The Sixth Circuit observed that "[t]he

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[7] Enhancements for precedent-setting results are different from enhancements based on novelty or complexity, which this Court criticized in *Blum*, 465 U.S. at 898-99, on the ground that such factors increase either the number of hours a lawyer must spend on the case or the lawyer's hourly rate and thus are reflected in the lodestar. In some cases, the lodestar figure might fully account for extraordinary performance and results, but truly precedent-setting cases like *Geier v. Sundquist*, discussed *infra*, are often not merely the result of additional hours or higher fees.

legal principles advanced by the Geier Plaintiffs were pathbreaking and of great social import." *Geier*, 372 F.3d at 795. The court further emphasized the "exceptional nature and national significance of this case" insofar as it "steered the jurisprudence in a different direction" and provided the impetus for "concerted" federal enforcement efforts, including litigation to desegregate the systems of public higher education in four other states. *Id.* at 796. Moreover, the groundbreaking legal principles established in *Geier* were subsequently affirmed by this Court in *United States v. Fordice*, 505 U.S. 717 (1992).

Geier thus contributed significantly to the enforcement of civil rights law by clarifying the constitutional obligations of state higher education systems and spurring additional enforcement efforts. On remand, the district court took these factors into account and concluded that a 25% enhancement was "justified and reasonable" given the "overall result obtained and the rare and exceptional nature of the case." *Geier v. Sundquist*, No. 5077, slip op. at 10 (M.D. Tenn. Jan. 21, 2005).

In a similarly pathmarking case that provided significant guidance regarding compliance with antidiscrimination law, the district court in *Chrapliwy v. Uniroyal, Inc.*, 583 F. Supp. 40, 45 (N.D. Ind. 1983), awarded an enhancement for "exceptional" performance and results under Title VII's attorney's fees provision, 42 U.S.C. § 2000e-5(k), which served as a template for Section 1988. In *Chrapliwy*, the plaintiff class of over 500 female workers at an Indiana factory obtained a substantial settlement in a

Title VII action challenging gender-segregated hiring and seniority policies. 583 F. Supp. at 42.

The settlement was prompted by the plaintiffs' separate administrative action, in which the U.S. Department of Labor threatened to bar the factory's corporate owner, then one of the federal government's largest contractors, from future contracts, pursuant to Executive Order No. 11246, 30 Fed. Reg. 12,319 (1965), *reprinted as subsequently amended in* 42 U.S.C. § 2000e app. (prohibiting discrimination by federal contractors). *Chrapliwy*, 583 F. Supp. at 42-43; *see also Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 444-48 (N.D. Ind. 1981). In awarding an enhancement, the district court emphasized the "impact of this lawsuit on the Department of Labor":

> The actions by the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures. This mechanism will continue to operate, vindicating the rights of other employees and effectuating the congressional intent behind both Title VII and the Executive Order.

Chrapliwy, 583 F. Supp. at 45 (quoting *Chrapliwy*, 509 F. Supp. at 462).[8]

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[8] The district court originally approved a larger enhancement. *See Chrapliwy*, 509 F. Supp. at 462. The Seventh Circuit held that the district court "carefully evaluated its reasons for allowing" the enhancement. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982). But the Seventh Circuit determined that the district court's lodestar calculation was too

Also illustrative of this category of cases is *Shakman v. Democratic Organization of Cook County*, 677 F. Supp. 933 (N.D. Ill. 1987), in which the district court granted an enhancement equal to one-third of the lodestar because it had "never presided over a case with greater significance or more widefelt impact in the area of civil rights." *Id.* at 944-48. Counsel was able to "invoke judicial protection of constitutional rights which previously had not been clearly recognized by the courts"; and the litigation gave "rise to a new class of equitable actions" to protect the "constitutional right[ ] to be free from political coercion in public employment" and "resulted in substantial political, social and economic benefits not only for members of the plaintiff classes, but also for all who are affected by the public officers and entities named as defendants in this action." *Id.* at 945, 947.[9]

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low and ordered increases. *Id.* Due to this alteration, the Seventh Circuit remanded for the district court to check for "possible overlaps" between the factors encompassed in the new lodestar figure and the enhancement. *Id.* On remand, the district court reduced the amount of the enhancement to account for overlap. *Chrapliwy*, 583 F. Supp. at 45.

[9] *See also Rajender v. Univ. of Minn.*, 546 F. Supp. 158, 171 (D. Minn. 1982) (granting an enhancement in a case that resulted in comprehensive policy reforms "to ensure that the University of Minnesota is purged of discriminatory employment practices"); *Reynolds v. Abbeville County Sch. Dist. No. 60*, No. 72-1209, 1978 WL 64, at *8 (D.S.C. Mar. 16, 1978) (granting a 10% enhancement because the case contributed to "the elimination of discrimination by the Edgefield public schools in faculty employment and assignment [which] will produce benefits for all teachers, principals and residents of the county," and "[t]he case also established precedent which will

2. Courts have also found it appropriate to enhance fees in civil rights cases that achieve far-reaching policy changes and root out entrenched statutory or constitutional violations. As this Court has recognized, Congress intended for fee-shifting provisions to promote broad, rather than piecemeal, civil rights compliance. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of *securing broad compliance with the law*." (emphasis added)).

This Court's observations in *Piggie Park*—a case that was cited favorably in the legislative history of Section 1988, *see* Senate Report 3; House Report 6—remain relevant today given the central role that private litigants continue to play in the enforcement of civil rights laws. Cases that establish broad-based relief vindicate the public interest by bringing large institutions or government agencies into full compliance with the law, which benefits similarly-situated plaintiffs and the public generally.

Awarding an enhancement on this basis does not conflict with this Court's admonition in *Blum* that the "number of persons benefited" should not be a significant consideration in calculating fees. 465 U.S. at 900 n.16 (emphasis omitted). In the context of a class action, *Blum* held that an attorney should not need enhanced compensation merely because the class includes a large number of individuals. *Id.*

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benefit faculty members, present and future, in the jurisdiction of the Fourth Circuit").

("Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual."). *Blum* did not, however, consider the incentives that may be necessary to attract attorneys to cases with sweeping public benefits; it addressed only the level of lawyerly diligence required once a case has been filed.

For example, a district court awarded a 50% enhancement for exceptional performance and results in a class action that successfully challenged the hiring and promotion practices of the Pennsylvania State Police, where racial discrimination "was so entrenched that the Governor of the Commonwealth conceded he could not eliminate it—and he had failed in the attempt." *Bolden v. Pa. State Police*, 491 F. Supp. 958, 966 (E.D. Pa. 1980). The court recognized that the lawsuit resulted in "tangible benefits flowing directly to the citizenry of the Commonwealth." *Id.* As a consequence of the case, "minorities have access to employment in the Pennsylvania State Police on a nondiscriminatory basis, and the citizens of Pennsylvania will have a representative law enforcement agency that is not tainted by constitutional illegality." *Id.*

An equally far-reaching outcome was one of the key factors justifying the enhancement in *White v. City of Richmond*, 559 F. Supp. 127 (N.D. Cal. 1982), *aff'd*, 713 F.2d 458 (9th Cir. 1983). The plaintiffs in *White* alleged that Richmond, California police officers routinely beat, harassed, and then filed groundless charges against African-American residents. The lawsuit resulted in a consent decree that required the police department to overhaul its policies

on the use of deadly and non-deadly force, establish training programs and counseling for all officers, permit an independent monitor to inspect the department's internal affairs and citizen complaint files, and provide an affirmative action program for minority officers. *White*, 559 F. Supp. at 130, 134. The Ninth Circuit upheld the district court's conclusion that the comprehensive remedial scheme represented the type of "exceptional success" warranting an enhancement. *White*, 713 F.2d. at 462.

Similar considerations have guided other courts in awarding enhancements for outcomes that contributed exceptionally to civil rights enforcement, and especially those that precipitated "fundamental change to a recalcitrant agency" or institution. *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999).[10] This criterion has also been applied in cases in which LDF opposed the substantive result for which the enhancement was awarded. *See, e.g., Parents In-*

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[10] *See also, e.g., DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 330-31, 334 (W.D. Tex. 2007) (awarding an enhancement for a successful challenge to a racially discriminatory credit-scoring system where attorneys achieved "extraordinary results," including a "change in the credit scoring formula, an educational outreach program, multi-cultural marketing, [and] an improved appeals process"); *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 51, 61 (D.P.R. 1988) (granting an enhancement because, *inter alia*, plaintiffs' attorneys were "pioneers of the prisoners' rights movement in Puerto Rico" and "[w]ithout their initiative, more than 8,000 citizens would probably still be held under custody in violation of their basic constitutional rights"); *Kirksey v. Danks*, 608 F. Supp. 1448, 1458 (S.D. Miss. 1985) (awarding an enhancement where, *inter alia*, "this lawsuit was the one major factor causing the petition drive and referendum election ultimately changing the form of government for the City of Jackson").

volved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *Meredith v. Jefferson County Bd. of Educ.*, No. 3:02CV-620-H, 2007 WL 3342282, at *4 (W.D. Ky. Nov. 9, 2007) ("Regardless of one's view of the law or educational policy, this case has changed the face of American jurisprudence.").

The instant case squarely meets this second criterion for awarding an enhancement for extraordinary performance and results. As the district court recognized, Respondents secured "sweeping relief to the plaintiff class" of 3,000 foster care children who alleged widespread constitutional and statutory violations, and they did so through a consent decree that is both "comprehensive in its scope and detailed in its coverage." Pet. App. 152-54 (reviewing the decree's thirty-one outcome measures that seek improvement in different areas of the foster care system). The district judge further concluded: "After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 154.

3. The three attorney's fees cases cited in the legislative history of Section 1988, *see* Part I.A *supra*, are also consistent with the criteria outlined above:

Davis v. County of Los Angeles. In *Davis*, a class of Latino and African-American plaintiffs prevailed on their claim that the Los Angeles County Fire Department's hiring practices were racially discriminatory. A sweeping remedial order provided "substantial and significant benefits" to the class, including fair and equitable hiring procedures. *Davis*, 1974 WL 180, at *1. On a motion for attorney's fees, the

district court enhanced the lodestar figure by more than 13%, after considering the "excellent results" achieved by the plaintiffs' attorneys. *Id.* at *2.[11]

Stanford Daily v. Zurcher. After demonstrators injured several police officers during a protest against Stanford University Hospital's firing of an African-American employee, the *Stanford Daily* published photographs of the incident. *See* William Trombley, *Campuses Optimistic That Calm Will Prevail*, L.A. Times, Apr. 12, 1971, at D1. A federal district court held that the police violated the Fourth Amendment when they searched the newspaper's office for negatives of unpublished photographs in an effort to identify the assailants. *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 126-27 (N.D. Cal. 1972). On a motion for attorney's fees, the district court granted an enhancement based in part on the extraordinary "results obtained by the litigation," which set a new constitutional standard for searches of individuals who are not themselves suspected of a crime. *Stanford Daily*, 64 F.R.D. at 687-88.[12]

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[11] The Ninth Circuit affirmed in part the liability and remedial rulings. *See Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977). This Court granted certiorari, but subsequently dismissed the case as moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

[12] Although this Court acknowledged that the district court's constitutional analysis was pathmarking, it ultimately rejected such a "sweeping revision of the Fourth Amendment." *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978). In doing so, however, the Court did "not consider the propriety of [the fees] award," *id.* at 553 n.3, and its decision does not disavow Congress's intent to authorize Section 1988 enhancements where a similarly precedent-setting result is obtained.

Swann v. Charlotte-Mecklenburg Board of Education. This case, which was litigated by amicus LDF and local co-counsel, involved "the largest metropolitan school system which at that time had ever been completely desegregated by order of court." *Swann*, 66 F.R.D. at 485. Ruling on a motion from LDF's local co-counsel for attorney's fees after years of litigation including a victory in this Court, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the district court did not expressly award an enhancement; but, relying in part on the attorneys' "excellent" results in the face of significant obstacles, the district court granted them more than double the rate it identified as the minimum hourly fee charged by counsel appearing in federal courts. *Swann*, 66 F.R.D. at 484, 486.

Enhancements in antitrust cases, including *Arenson* described in Part I.B *supra*, also are consistent with these criteria. *See* 372 F. Supp. at 1352, 1358 (awarding an enhancement where "[a]n entire industry has been restructured" as a result of the suit and the case "could well be of great instructive precedent in subsequent litigation").

4. Federal courts have been careful to respect this Court's mandate that enhancements for extraordinary performance and results should only be granted in exceptional circumstances. Enhancements are uncommon, and courts have consistently denied them for garden-variety discrimination claims brought by individual plaintiffs. *See, e.g.*, *West v. Tyson Foods, Inc.*, No. 4:05-cv-183M, 2008 WL 5110954, at *3 (W.D. Ky. Dec. 3, 2008); *Baty v. Willamette Indus., Inc.*, 985 F. Supp. 1002, 1008 (D. Kan. 1997); *see also Lynch v. City of Milwaukee*, 747

F.2d 423, 428 (7th Cir. 1984) ("[P]ositive multipliers should be given only in cases that are significant and where the quality of the attorney's work is considerably above average. . . ." (internal citations and quotation marks omitted)).

Federal courts have thus consistently recognized the link between achievement of the important objectives set out by Congress in federal civil rights statutes and the practical reality that lawyers need incentives to choose cases that challenge entrenched inequities and have the potential to produce groundbreaking results, and then to advocate for appropriately wide-ranging relief. *See Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of City of White Plains*, 533 F. Supp. 1054, 1065-66 (S.D.N.Y. 1982) (finding an enhancement justified to encourage private attorneys to take "cases such as the present one, which succeed in accomplishing major changes in the hiring policies and practices of municipal agencies, and which open up significant employment opportunities to minorities").

B. The criteria that courts have used to award enhancements for extraordinary performance and results are consistent with Supreme Court precedent.

The criteria outlined in Part II.A *supra* are consistent with the guidelines set forth by this Court's interpretations of Section 1988 and similar attorney's fees provisions in other federal statutes.

In *Blum*, this Court rejected a categorical rule that enhancements are never permissible in cases of "exceptional success." 465 U.S. at 897, 901. *Blum* stressed that it was not precluding consideration of

"results obtained" but rather establishing a strong presumption that results are factored into the lodestar calculation. *Id.* at 900-01. That presumption may be rebutted, but "only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower court." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (quoting *Blum*, 465 U.S. at 898-901). As discussed in Part II.A *supra*, federal courts have appropriately applied these instructions to distinguish those rare and exceptional cases for which results-based enhancements are justified.

Federal courts' awards of enhancements for extraordinary performance and results are also consistent with *City of Burlington v. Dague*, 505 U.S. 557 (1992) (denying an enhancement on the ground that the case was taken on a contingency basis). In *Dague*, the Court was concerned that awarding contingency enhancements would create incentives for attorneys to bring "relatively meritless claims," which is "an unlikely objective of the 'reasonable fees' provisions." *Id.* at 563. In sharp contrast, enhancements for extraordinary performance and results create exactly the sort of incentives that Congress contemplated: They encourage attorneys to choose and pursue cases with strong factual bases that significantly further equality of opportunity and other critical civil rights.

The Court in *Dague* also worried that contingency enhancements would already be reflected in the lodestar calculation. *Id.* at 562-63. But in the rare cases warranting enhancements for exceptional performance and results, the lodestar does not always

provide the appropriate incentives to attract competent counsel to assert bold legal theories in challenges to entrenched discrimination and other inequities. *See, e.g., Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972) (noting that a voting discrimination case, where "plaintiffs have benefited their class and have effectuated a strong congressional policy," "clearly falls among those *meant to be encouraged* under the principles articulated in [Supreme Court precedents endorsing attorney's fees for citizens acting as private attorneys general]" (emphasis added)), *cited with approval in* Senate Report 4 n. 3. Without incentives for attorneys to take on these types of cases, civil rights laws will not always be vigorously and effectively enforced, contrary to the intent of Congress.

Moreover, while the lodestar calculation typically reflects the skills and experience that a lawyer brings to bear on a case, it is not determined based on the type of case and relief the lawyer chooses to pursue. *Cf. Graves v. Barnes*, 700 F.2d 220, 223 (5th Cir. 1983). The proper inquiry in determining an enhancement for extraordinary performance and results is the *value* of the legal services provided—more value is provided through broad-reaching relief. For example, where a civil rights litigant secures an order or consent decree that results in groundbreaking policy reforms, the outcome affects not only the plaintiffs but also numerous other individuals who do not have to sue to obtain relief on their own.

In sum, Petitioners urge—without any basis in text, precedent, or legislative history—a new Court-made rule that would structurally under-compensate

civil rights litigants in key cases yielding the most extraordinary results that significantly safeguard and enhance critical civil rights. The Court should reject Petitioners' unsupported attempt to ignore Congress's considered judgment that the full availability of reasonable attorney's fees is crucial to the vigorous and effective enforcement of federal civil rights laws.

CONCLUSION

For the foregoing reasons, as well as those outlined by Respondents, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SONNY PERDUE, Governor of Georgia, *et al.*,
Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Whether a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in the appropriate use of public funds.[1] Although *amici* strongly support the nation's civil rights laws and appreciate the need for a fee-shifting provision such as 42 U.S.C. §1988, no purpose related to the protection of civil rights is furthered by very large and unpredictable results-based fee enhancements. At the same time, other citizens rely on state programs which of necessity must be diminished in order to pay a windfall bonus to plaintiffs' lawyers. Because *amici* believe results-based fee enhancements are a gross and unwarranted interference with state fiscal policy and planning, they respectfully submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. The purpose of §1988 is to attract competent counsel to civil rights cases so that plaintiffs obtain effective access to the judicial process. This purpose is undercut by performance and results-based fee enhancements. This Court has long supported settlements of appropriate civil rights cases by consent decree. If, however, the judgment of the court of appeals is affirmed, the unpredictability of attorney's fees will make States less likely to enter into consent decrees.

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[1] The parties have consented to the filing of this brief, which was not authored in whole or in part by counsel for any party. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

When Congress enacted §1988 it could not have intended that compensating lawyers would compromise the vindication of civil rights. Yet performance and results-based fee enhancements do precisely that because their unpredictability makes risk management even harder for state and local governments, and settlements commensurately less attractive. This works against the interests of civil rights plaintiffs, such as those in this case, who, by the district court's own admission, obtained more relief via settlement than the court could have awarded had they prevailed on the merits at trial. Such a perverse incentive squarely conflicts with this Court's teaching that attorney's fees are part of the "arsenal of remedies available" to plaintiffs "to combat violations of civil rights." *Evans v. Jeff D.*, 475 U.S. 717, 732 (1986).

There are particular reasons why federal judges should not order States to pay results-based fee enhancements. Giving the federal courts the discretion to enhance fee awards beyond the compensatory unilaterally reorders state fiscal and policy priorities by diverting public funds from other public uses. Such enhancements also favor particular rights, or particular plaintiff groups, over others. Because every judgment that supports a fee award under §1988 also vindicates civil rights, a rule that favors some rights or groups cannot be squared with the even-handed protection of all civil rights.

2. The purpose of §1988 is not advanced by performance and results-based fee enhancements. Instead of attracting counsel to civil rights cases, enhancements only give lawyers an incentive to perform exceptionally once they undertake representation of a client. This is unnecessary because "when

an attorney first accepts a case and agrees to represent the client," it is already his obligation "to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

In addition to lawyers' basic ethical duties, existing incentives make fee enhancement superfluous. Lawyers have an interest in enhancing their reputations by performing exceptionally and attaining exceptional results, and many lawyers are also motivated by serving the public interest. Such duties and incentives make fee enhancement neither necessary to motivate lawyers in civil rights cases to strive for excellence, nor to attract counsel to represent plaintiffs in civil rights cases.

ARGUMENT

I. THE UNPREDICTABILITY OF PERFORMANCE AND RESULTS-BASED FEE ENHANCEMENTS IMPEDES THE PURPOSE OF §1988.

A. Fee Enhancements Discourage Settlements.

The purpose of §1988 is "to attract competent counsel" to civil rights cases so that plaintiffs obtain "effective access to the judicial process." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 430 n.4 (1983) (internal quotation marks omitted). This policy is undercut by a performance and results-based fee enhancement. Settlement via consent decree is critical to the vindication of civil rights, and this Court has declined to adopt rules that would "reduc[e] the attractiveness of settlement" to the detriment of plain-

tiffs. *Evans v. Jeff D.*, 475 U.S. 717 (1986). But if the judgment of the court of appeals is affirmed, the unpredictability of attorney's fees will make States less likely to enter into consent decrees and more likely to litigate cases to judgment.

Section 1988 works by providing prevailing counsel "a fully compensatory fee." *Hensley*, 461 U.S. at 435. Congress could not have intended, however, that compensating lawyers would in any way compromise the vindication of plaintiffs' civil rights. Fee-shifting statutes such as §1988 "were not designed as a form of economic relief to improve the financial lot of attorneys . . . . Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries." *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*").

Performance and results-based fee enhancements threaten the very policy they purport to advance; "many civil rights plaintiffs will benefit from . . . offers of settlement." *Marek v. Chesny*, 473 U.S. 1, 10 (1985). But because a substantial enhancement may be arbitrarily charged to defendants who consent to plaintiffs' relief, the cost of settlement becomes substantially less predictable, and settlement commensurately less attractive. Indeed, it was only through a consent decree in this case that the plaintiffs obtained such extensive relief from the State; the district court observed that it was doubtful plaintiffs could have obtained relief as "intricately detailed and comprehensive" if they had prevailed on the merits. Pet. App. 154.

"The parties' *consent* animates the legal force of a consent decree." *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (emphasis added). As the

Court explained in *United States v. Armour & Co.*, "consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation."[2] 402 U.S. 673, 681-82 (1971). Accordingly, "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package." *Jeff D.*, 475 U.S. at 734.

As the $4.5 million awarded here illustrates, fee enhancements can be very costly to a State. Yet they are very difficult to predict, thereby impeding settlements and preventing States from carrying on with governance.[3] One of the principal advantages of settlement to defendants is the ability to "make lump-sum offers that would, if accepted, represent their total liability." *Chesny*, 473 U.S. at 6; *White v.*

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[2] Consent decrees are subject to one qualitative standard: the determination that they are "fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2). The form and structure of each consent decree will undoubtedly vary from case to case, but assuming that a court of equity discharges its function, it does not make sense for one settlement to be more "fair" or just than another, any more than one attorney's fee can be more "reasonable" than another. It does not make sense to define exceptional results by reference to the nature of the settlement.

[3] This Court has expressed grave misgivings about the 12-factor test that was employed prior to the enactment of §1988 because it "gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Delaware Valley I*, 478 U.S. at 562 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

New Hampshire Dep't of Employment Security, 455 U.S. 445, 454 n.15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from damages and fees.").

Although the lodestar is ordinarily not calculated until a consent decree is entered, *see id.* at 447-48, it provides a state defendant with a basis to estimate its maximum exposure for attorney's fees. *See Hensley*, 461 U.S. at 433. As this Court has stated, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." *Chesny*, 473 U.S. at 7 (internal quotation marks omitted). And because "[t]he unpredictability of attorney's fees may be just as important as their magnitude [to] a defendant [who] is striving to fix its liability," *Jeff D.*, 475 U.S. at 735, the possibility of an even more unpredictable enhancement could tip the State's calculus against settlement.

At the very least, the prospect of a results-based enhancement following a consent decree will cause state defendants to agree to less than what plaintiffs might otherwise have obtained via settlement. Because of the State's duty to its citizens, consent decrees are not uncommon. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("[R]esponsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity."). States may also agree to provide greater relief than what is legally required. *See Rufo v. Inmates of the Suffolk County Jail*, 520 U.S. 367, 389 (1992).

As the Court explained in *Chesny*, 473 U.S. at 10, "[s]ome plaintiffs will receive compensation in set-

tlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation." Where injunctive relief is at stake, moreover, timely relief may be essential. All of these potential benefits to plaintiffs are jeopardized by the prospect of results-based fee enhancements.

Such an outcome squarely conflicts with this Court's teaching that attorney's fees are part of the "arsenal of remedies available" to plaintiffs "to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732. Indeed, in *Jeff D.*, this Court held that a plaintiff could agree to waive his attorney's fee altogether. *Id.* at 730-33. In that case, the waiver of fees was part of a State's settlement offer containing virtually all of the injunctive relief that the plaintiffs had sought—the "best result [plaintiffs] could have gotten" in court. *Id.* at 723. Declining to forbid waivers, the Court observed that the attorney's fee itself was a "bargaining chip" that was useful to both plaintiffs and defendants. "To promote both settlement and civil rights," the Court recognized "the possibility of a tradeoff between merits relief and attorney's fees." *Id.* at 733.

B. Rather Than Serving a Compensatory Purpose, Fee Enhancements Disrupt State Fiscal Policy.

There are other reasons why States should not bear the cost of results-based enhancement. First, if federal judges enjoyed the discretion to measure "superior results" according to their perceptions of the

public good,[4] they would be imposing their views of public priorities on a State, thereby overriding the State's own fiscal policy and legislative priorities.

Section 1988 does not express a preference for the vindication of particular rights, or classes rather than individual plaintiffs. Yet results-based enhancements enable federal judges to reward lawyers for taking on cases based on the nature of the right at stake or the class size. This Court has already rejected the argument that "the *number* of persons benefited" is relevant to the calculation of fees, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), explaining that "[p]resumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or . . . in protecting the civil rights of a single individual." *Id.* Since the number of persons benefited is irrelevant, a determination of public benefit must be based on the judge's opinion of the importance of the vindicated right to the public good.

As the Court explained in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, "[a]bsent some judicially manageable standard for gauging 'importance,'" the criterion of awarding attorney's fees based on the importance of the statutory right being protected "would apply to all substantive congressional legislation providing for rights and duties generally applicable, that is, to virtually all congressional output." 421 U.S. 240, 264 n.39 (1976). Because every judgment that will support a fee award similarly vindi-

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[4] *See* Pet. App. 90-92 (Wilson, J., concurring) (viewing public benefit as an appropriate factor to consider in support of enhancement); *Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001) (directing trial court to consider public benefit in its calculation of attorney's fees).

cates federal rights under §1983, the power to favor some rights cannot be squared with the even-handed protection of all civil rights.

A public-benefit-based enhancement thus contains the same flaw as the analytical framework for fee-shifting that was used prior to the enactment of §1988. In *Alyeska Pipeline*, the Court reaffirmed the American Rule, requiring each party to bear its own costs of litigation in the absence of fee-shifting statute. It expressly declined to recognize an exception that would allow "attorney's fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.* at 263. It is, the Court held, not a proper function of the judiciary "to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." *Id.*

Fee enhancement also has a considerable impact on the public fisc. As Judge Carnes observed, "[t]he multi-million dollar enhancement, over and beyond the full lodestar sum . . . amounts to an involuntary, federal court ordered contribution from the taxpayers of Georgia to a non-profit organization." Pet. App. 56-57.[5] Unless the judgment below is reversed, the $4.5 million fee enhancement will, of necessity, reduce the amount of state funds available to address other public needs.

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[5] *See also In re North*, 8 F.3d 847, 851 (D.C. Cir. 1993) (while allowing fees, court noted that "attorney's fees in this range will not appear reasonable to most of the taxpayers who ultimately bear the burden of this award"); *id.* at 853 ("[W]e are quite certain that [Mr.] Cutler could have found more reasonable accommodations than this if he expects the taxpayers to reimburse his client.").

Because the use of state funds to pay court-ordered fee enhancements to the attorneys of one class of citizens comes at the expense of other citizens, it is highly problematic as a matter of public policy. Congress could not have intended this result when it enacted §1988. Indeed, the problem presented is analogous to the one this Court addressed in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), in which it held that punitive damages cannot be awarded against local governments under §1983.

In *Newport*, this Court reasoned that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 453 U.S. at 267. Common-law tradition had long understood "punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263. Accordingly, the courts "protected the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id.* As the *Newport* Court, quoting a state supreme court opinion, explained, punitive damages

> can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . . , being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff,

> cannot be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 261 (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)).

The primary purpose of damages under §1983 is compensation. *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *see id.* at 254-55 ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." (quoting 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956))). Any damages beyond compensation, however, must be based on specifically punitive or deterrent rationales. *See id.* at 257 n.11; *Carlson*, 446 U.S. at 21-22. Punitive damages, as an expression of the "community's vindictive sentiments," *Newport*, 453 U.S. at 267, may be available against government officials sued in their personal capacity. *See Kentucky v. Graham*, 473 U.S. 159 (1985). By contrast, when the defendants are state or local governments or officials sued in their official capacity, they "are not sensibly assessed" because a government cannot have malice or evil motive. *Newport*, 453 U.S. at 267. Moreover, there "is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public excoriation of those who were elected, will not occur unless punitive damages are awarded." *Id.* at 269. Compensatory damages would be sufficient to "induce the public to vote the wrongdoers out of office." *Id.*

Like §1983, the purpose of §1988 is served through the compensation principle, though according to the value of the lawyer's service, *see Hensley*, 461 U.S. at 435, not the plaintiff's injuries or costs. *White*, 455 U.S. at 452 ("Unlike other judicial relief,

the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to the action."); *see also City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986). Thus, if an attorney's fee award is fully compensatory, the purpose of §1988 is satisfied. Any amount beyond what is necessary to compensate the lawyer must perforce serve a function that is not authorized by the statute.

To be sure, an enhancement based on superior performance and results is ostensibly a reward for a job well done, not an intentionally punitive sanction against the defendant. And just as compensatory damages serve an important deterrent function under §1983, *see Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White J., concurring), the attorney's fee itself serves as a deterrent measure, particularly in cases involving only injunctive or declaratory relief. *Rivera*, 477 U.S. at 575. But as this case illustrates, no more than the lodestar amount—here, $6 million—is required to deter. *Cf. Carey*, 435 U.S. at 256-57 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."). Furthermore, the gratuitous expenditure of state funds by federal courts to reward lawyers for doing good work bears no relation to any traditional function of damages. As petitioners demonstrate, Pet. Br. 18-28, nothing in the language or legislative history of §1988 suggests otherwise.

II. ENHANCING FEES FOR SUPERIOR PERFORMANCE AND RESULTS IS NOT NECESSARY TO ATTRACT COMPETENT COUNSEL TO CIVIL RIGHTS CASES.

The purpose of the fee shifting statutes is to "attract competent counsel." It is not to motivate competent counsel, once retained, to perform exceptionally or attain exceptional results—however these qualities may be gauged. This is already the duty of every lawyer who undertakes the representation of a client. Rather than being necessary to fully compensate counsel, a results-based fee enhancement is at best redundant and at worst distortive of lawyers' basic ethical duties.

This Court has never yet ruled that an enhancement to the lodestar was necessary to effectuate the purpose of §1988. In *City of Burlington v. Dague*, for example, the Court categorically barred the use of multipliers based on risk, rejecting the argument that a risk enhancement—which would approximate parity with what the private market would pay—was necessary to achieve the statute's purpose. 505 U.S. 557 (1992).

There is even less reason to allow enhancement based on superior performance and results. The risk multiplier rejected in *Dague* was at least related to the purpose of attracting competent counsel.[6] A re-

[6] It is a "fact of the market" that attorneys who take contingent fee cases tend to charge higher fees than hourly rates paid regardless of outcome. *Dague*, 505 U.S. at 567 (Blackmun, J., dissenting) (citing Posner, Economic Analysis of Law s 21.9, at 534-35 (3d ed. 1986)). Thus, as the *Dague* respondents urged, because plaintiffs who can only offer contingent payment must compete for attorneys' time in a market where other bidders of-

sults-based enhancement, however, does not advance this policy. At best, such an enhancement implicates pre-existing responsibilities that are triggered *once an attorney is retained*: "when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Delaware Valley I*, 478 U.S. at 565. The Court's directive, which expressly covers both performance and results, embodies two precepts of professional ethics.

First, zealous advocacy is the "fundamental principle of the law of lawyering." Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Rules of Professional Conduct 17 (Supp. 1998); *see also* Model Rules of Prof'l Conduct pmbl. ¶ 2 (2008); Model Code of Prof'l Responsibility Canon 7 (1980); Restatement (Third) of the Law Governing Lawyers §16 cmt. d (2000). In the current Model Rules, the principle is incorporated in the duties of diligence and competence.[7] *See* Model Rules of Prof'l Conduct R. 1.1, 1.3 (2008).

As for results, the duty of loyalty demands that lawyers dedicate themselves to their client's cause. This Court has recognized that "the duty of the lawyer . . . is to further the interests of his clients by all lawful means, even when those interests conflict with the interests of the United States or of a State."

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fer "certain" fees, without a risk enhancement fewer competent attorneys would be willing to take the plaintiffs' cause. *Id.* at 562.

[7] The duty of diligence in Model Rule of Professional Conduct 1.3 has been construed as zealousness. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Rules of Professional Conduct §6.2 (3d ed. 2001).

In re Griffiths, 413 U.S. 717, 724 n.14 (1973). Such representation "casts the lawyer in his honored and traditional role as an authorized and independent agent acting to vindicate the legal rights of a client, whoever it may be." *Id.*; *cf. Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) ("[A] defense lawyer best serves the public . . . by advancing the undivided interests of his client."). Thus, it is the obligation of the lawyer to seek the results the client wants.

This duty can sometimes produce conflicts of interest that are exacerbated by the attractiveness of additional, results-based financial rewards. *Cf. Jeff D.*, 475 U.S. at 717 (conflict created by settlement offer stipulating the waiver of attorney's fee). Like an evaluation of contingency, an evaluation of superior performance and results partly depends on the "legal and factual merits of the [case] and the difficulty of establishing those merits."[8] *Dague*, 505 U.S. at 563. Similarly, consideration of these factors at a fee

[8] Indeed, the difficulty of the case and the contentiousness of litigation are also inappropriate factors to consider as the basis for enhancement. Close or complex cases will usually be the most difficult to litigate. Yet "[c]lose cases may . . . cast the loser assessed for fees in the role of one unfairly and severely punished for proceeding entirely reasonably. Though he may have lost, he acted not only within his rights but with good foundation in contesting the case." Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982). The same goes for contentiousness, since "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). And "[n]othing in the legislative history or the statute itself suggests that Congress intended section 1988 fees to be used to sanction government officials for rigorously defending their right—or, better, exercising their duty . . . ." *Robinson v. Ariyoshi*, 933 F.2d 781, 785-86 (9th Cir. 1991).

hearing may compel a lawyer to "show that his client had only a slight prospect of success when the case was brought" by "emphasiz[ing] the barriers the client faced: ambiguous precedents, conflicting evidence, [and] plausible defenses," thereby throwing the merits of the client's claim into doubt before the judge and opposing counsel. John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 482-83 (1981).

Superior performance and exceptional results ought to be the aspiration of every lawyer. But they are also already tied to natural incentives which underscore the redundancy of enhancement. Because a lawyer's livelihood is largely dependent upon reputation, it is in the lawyer's interest to perform exceptionally and achieve exceptional results. As Judge Carnes observed in this case, Jeffrey Bramlett, a private practitioner who was one of plaintiffs' counsel, enjoyed enhanced professional standing, prestige, and earning ability as a result of the plaintiffs' success. Pet. App. 52-53. In addition, many civil rights lawyers are motivated by social causes. *See id.* at 53-56 (discussing Marcia Lowry, founder and Executive Director of Children's Rights Group); *Jeff D.*, 475 U.S. at 721-22 & n.3 (upholding fee waiver where plaintiff's counsel was employed by a federally-funded legal aid society). In light of these pre-existing duties and incentives, results-based fee enhancements are unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-970

IN THE

SUPREME COURT OF THE UNITED STATES

SONNY PERDUE, ET AL.,

Petitioners,

v.

KENNY A., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents over 95,000 school board members who govern over 14,000 local school districts serving about 49.8 million students.

Serving a population of almost 50 million students, *Amicus* has a strong interest in ensuring that limited financial resources are directed toward providing the highest quality educational services for these students, rather than expended on attorneys or in litigation.

The Eleventh Circuit's decision permitting enhanced attorneys' fee awards based solely on the quality of performance and results obtained is against clear public policy and will result in scarce resources being redirected toward attorneys and litigation, and away from improving student achievement.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Nation's public schools are especially vulnerable to the adverse consequences of permitting the unpredictable enhancement of attorneys' fees under federal fee-shifting statutes. The chronic inadequacy of available resources to fulfill the growing demands placed on public schools frequently results in programmatic compromises that engender dissatisfaction and legal controversy. Given the paramount role school districts play in the development of our youth and in our civic infrastructure, litigation against school districts is, by its very nature, often intended not only to vindicate individual interests, but also to effectuate systemic change—change of the kind that in this case had drastic consequences for the fees awarded. Confronted by the prospect of high legal costs and institutional distraction entailed by litigation, school districts have powerful incentives to resolve legal disputes amicably—even disputes in which, were they pursued to their conclusion, the school district ultimately would prevail—and to take steps, beyond those legally required, in an attempt to ensure that similar disputes will not recur. By doing so schools can avoid future litigation and focus their attention on their educational mission

The combination of these realities makes this case one of extreme importance to school boards. By diverting scarce funds from educational programs to legal costs, the kind of fee enhancement at issue in this case has the ironic but very real potential to disserve those whom the federal statutes are intended to protect. By undermining the relative

predictability of the "lodestar" approach to calculating attorneys' fees, the Eleventh's Circuit's historical approach to fee enhancement stands to turn school districts' good faith efforts to compromise in legal disputes into a serious fiscal gamble. The message that will be delivered to school officials should this Court affirm the Eleventh Circuit is this: When it comes to attempts to address legal dissatisfaction with school district programs or practices, no good deed goes unpunished.

ARGUMENT

I. ENHANCED FEE AWARDS ARE AGAINST PUBLIC POLICY, ACTUALLY HURTING STUDENTS SERVED BY PUBLIC SCHOOLS.

The State of Georgia, like many other states,[2] is suffering from a significant budgetary shortfall which has led to dramatic cuts in funding for public services, including education.[3] In the midst of these dire economic times, the Respondents ask this Court to adopt the Eleventh Circuit's novel "enhanced fee award" theory, giving lower courts the discretion to substantially increase fee awards above the lodestar

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[2] *See* Reports from the non-partisan Education Commission of the States: *State Budget Shortfalls: Postsecondary Education Impacts*, http://www.ecs.org/clearinghouse/80/47/8047.pdf *and State Budget Shortfalls: Examples of State Responses*, http://www.ecs.org/clearinghouse/79/52/7952.pdf, last visited 6/24/09).

[3] *See* http://www.opb.state.ga.us/media/9848/2009-01-26_web_fy2010_state%20of%20georgia%20budget.pdf, last visited 6/24/09).

amount, based solely on subjective evaluations of the results obtained and the quality of legal representation provided. As discussed in detail in Judge Carnes' opinion and in the State of Georgia's principal brief, an enhanced fee award runs counter to prior decisions of this Court and the public policy that underlies fee-shifting statutes. Because public schools have limited and defined budgets, bonuses paid to attorneys unavoidably reduce the amount of money available to serve the educational needs of school children, including those who are the intended beneficiaries of the underlying civil rights litigation. Especially in tough budgetary times, public policy favors the use of taxpayer funds to provide essential educational services to students, not to enrich lawyers who already are well-compensated under the lodestar amount.

The fee-shifting statute at issue in the present case, 42 U.S.C. § 1988 (2000), was enacted by Congress in response to this Court's decision in *Aleyska Pipeline Service Co. v. Wilderness Society* 421 U.S. 240, 270 (1975), affirming the so called "American rule" and permitting prevailing plaintiffs to recover a "reasonable fee award" in civil rights litigation. In *Hensley v. Eckerhart*, 461 U.S. 424 (1982), this Court noted that the "purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Id.* at 429. The Congressional Record indicates that § 1988 was enacted "to promote the enforcement of the Federal civil rights acts, as Congress intended, and to

achieve uniformity in those statutes and justice for all citizens."[4]

This goal, to provide "justice for all citizens," is a key factor when divining Congress's intent in using the term "reasonable" in § 1988. The intent of § 1988 was not to enrich attorneys, but to ensure that the civil rights of citizens are protected. Congress noted that the fees under § 1988 should be "adequate to attract competent counsel" to prosecute civil rights cases and obtain relief when appropriate, but should not "produce windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913; see also H.R.Rep. No. 94-1558, *supra*, at 9.

Unfortunately, the Eleventh Circuit's historical approach to this issue, crafted prior to several recent decisions by this Court, requires that the enhanced fee award be based on quality of performance and results obtained. This approach cuts directly against the express public policy underlying § 1988 by providing windfalls to attorneys at the direct expense of the individuals whose interests they purport to represent.[5]

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[4] H.R. Rep.No. 94-1558, 94th Cong., 2d Sess. 1, 9 (1976); *see also* S. Rep.No. 94-1011, 94th Cong., 2d Sess. 6 (1976), 1976 U.S. Code Cong. & Adm. News at 6343; Remarks of Senators Scott, Mathias, Kennedy, and Tunney, 122 Cong.Rec. S16251-16252 (daily ed. Sept. 21, 1976); *id.* at S17051 (daily ed. Sept. 29, 1976), and Representatives Kastenmeier, Fish, Holtzman, Jordan, and Seiberling, *id.* at H12155, 12163-12165 (daily ed. Oct. 1, 1976).

[5] This argument is not intended to discount the valuable work that is accomplished by the attorneys who take on these cases. Indeed, the attorneys in this case clearly provided a valuable service by encouraging needed changes in the State's foster care system. However, the lodestar approach is crafted to

Like the present case, litigation against school districts frequently results from chronic underfunding that leads to systemic deficiencies.[6] In such cases, public schools will often seek to resolve the matter through mediation or negotiations that culminate in settlements or consent decrees that call for significant policy changes, structural overhauls, programmatic improvements and increased funding to correct the deficiencies. But under the Eleventh Circuit's "enhanced fee award theory," courts could reward the plaintiffs' attorneys with large performance bonuses that school systems can ill afford to pay, especially in light of the magnitude of the changes they have agreed to undertake in these settlement agreements. Under these circumstances, as Judge Carnes noted: "The perverse irony of the seven figure, court ordered gratuity . . . is that it reduces the amount of state funds available to care

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provide full compensation under these circumstances. *Amicus* simply believes that compensation for good lawyering already is a component of the rate portion of the lodestar calculation and therefore awarding a second bonus, as was done here, amounts to double-dipping. In the case of schools, this would wrongly reduce funds available to serve the educational needs of all students.

[6] For example, while the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

for . . .,' the very group that the [rewarded attorneys were so] dedicated to protecting."

This paradox—that scarce public funds intended to ensure all students receive appropriate educational services could be reallocated by court order to well-heeled attorneys—runs directly contrary to the public policies underlying our civil rights statutes and § 1988 in particular. The possibility that such a result will become commonplace is particularly troubling. Just at the point when public schools are facing both increasing expenses to serve a rapidly growing number of at-risk student groups, such as children with disabilities and English Language Learners, and declining revenues, the Eleventh Circuit's decision permits trial courts, at their own discretion, to redirect these scarce resources from needy students to attorneys. If Congress had intended such a result, it would have modified § 1988 after this Court's decisions in *Blum v. Stenson*, 465 U.S. 886 (1984), *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), which all rejected such enhancements.

The possibility of fee enhancements is particularly troublesome for school districts that adopt and operate on annual budgets that cannot begin to predict or accommodate fee enhancement awards. Since school districts frequently pay legal costs out of general operating funds, even one fee enhancement award has the potential to wreak havoc on their budgets. The deficit caused by the award would, in many instances, cause school

districts to fall out of compliance with state laws that mandate balanced budgets. *See, e.g,* Alaska Stat. § 14.17.099 (2009); Cal. Educ. Code § 42127 (2007); Mich. Comp. Laws Ann. § 388.1702 (2000); N.C. Gen. Stat. Ann § 115C-425 (1993); R.I. Gen. Laws § 45-12-22.1 (2003).

II. THE PROSPECT OF ENHANCED FEE AWARDS UNDERMINES THE RELATIVE CERTAINTY OF THE LODESTAR APPROACH, THEREBY REDUCING THE LIKELIHOOD OF SETTLING CERTAIN TYPES OF SCHOOL LITIGATION.

This Court has repeatedly noted that "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the reasonable fee ... ." *Dague*, 505 U.S. at 562. This language brings a degree of certainty to the calculation of the attorneys' fee component in civil rights litigation, which aids significantly in the resolution of these matters. This degree of certainty is critical to the advice school attorneys give to their school board clients about the prudence of proceeding with litigation or attempting good faith settlements.

Knowing the approximate range of the attorney's fees allows school boards to make more informed decisions about how to expend taxpayer dollars to resolve legal claims and gives the parties a structural framework within which to negotiate the resolution of attorneys' fees claims rather than litigate them. Indeed, that was the express purpose

of this approach: "[T]he interest in ready administrability that has underlain our adoption of the lodestar approach, *see, e. g., Hensley*, 461 U.S. at 433, and the related interest in avoiding burdensome satellite litigation (the fee application 'should not result in a second major litigation,' *id.*, at 437), counsel strongly against adoption of contingency enhancement." *Dague*, at 566. Unfortunately, the Eleventh Circuit's approach eliminates the certainty of the lodestar framework. Specifically, this new scheme could lead to satellite litigation over fees in virtually every case, brought by plaintiffs' attorneys who have decided to try to grab the enhancement brass ring instead of settling fee claims. Indeed, because a fee award includes fees incurred in an attempt to obtain fees, there is absolutely no disincentive to litigate these cases.

As noted in *Dague*, the lodestar approach promotes the prompt resolution of these fee disputes because it gives a degree of certainty to fee petition litigation. The parties know that the maximum exposure or ceiling for attorneys' fees is a simple factor of the hours being claimed times the rate being charged. By creating a ceiling on liability and thus a comfort level for the parties, the lodestar approach allows them to settle the underlying case while agreeing to disagree on fees and sometimes might even make disagreement over fees less likely. This option serves the public interest by allowing for the prompt resolution, short of trial, of underlying matters, thus providing needed benefits to the litigants and restricting any fee dispute to issues within the lodestar parameters.

Without the surety of the lodestar ceiling and with the prospect of being subjected to enhanced fee

awards, these settlements will become much less common and come at greater cost to school districts. In an attempt to avoid enhanced fee awards, school districts may opt to proceed with the litigation and prevail on the merits. Where the defendant has at least a tenable defense, there is markedly less incentive to settle since it opens the possibility of a fee enhancement. This is a waste of precious public resources.

In the present case the State of Georgia was faced with trying to resolve the underlying claims related to the foster care system as well as an attorneys' fee claim in the amount of $7,171,434.30 for 29,908.73 hours at rates of between $75 and $495 an hour. *Perdue v. Kenny A*, 532 F.3d 1209, 1216 (11th Cir. 2008). Georgia was able to successfully negotiate the resolution of the underlying claims, but the parties disagreed on the attorneys' fees component. They eventually settled the underlying claims and agreed that they would "'attempt without court intervention to resolve the proper amount of Class Counsel's fees and expenses of litigation.' If the parties could not reach an agreement, then [t]he amount of any award shall be determined by the Court in accordance with the requirements of applicable law and procedures." *Id.*

This process is fairly common in litigation against school districts, and is facilitated by the certainty that the lodestar approach brings to the table. Under the lodestar approach, a school district may be comfortable settling the underlying litigation and submitting the fee claim to a court for resolution, believing that there is a ceiling amount

on the fees being requested. However, if in addition to the lodestar amount, a school district could also be subjected to a drastic and unpredictable enhancement of the fee award, school boards may very well decline to settle the underlying litigation, and force the matter to trial. Such a result, and the attendant expense and distraction, would strip the benefits of a more expeditious relief from the plaintiffs as the litigation proceeds for many years. Certainly, such a result cuts against the express public policy underlying § 1988, which is to enhance the enforcement of federal laws, not prolong the deprivation of the rights afforded by them.

Moreover, such a result is particularly disconcerting in the federal cases brought against school districts. By their very nature, claims against school districts frequently involve issues in which the relief sought is of a systemic, rather than only an individualized, nature. Whether the case involves the provision of a particular type of special education services, student assignment plans, harassment or bullying, student-led prayer, cross-dressing at the prom, or alleged employment discrimination, settlement may be much less likely where the prospect of an enhanced fee award haunts any concession by the school district. This in turn diverts precious resources, both monetary and human, from education to unnecessarily prolonged litigation, and clogs the courts with cases that otherwise could have been resolved short of litigation. This Court's lodestar approach allows these cases to settle promptly leaving the fee dispute for later resolution. The Eleventh Circuit's

enhanced fee award approach substantially impedes settlement and encourages unnecessary litigation.

III. ENHANCED FEE AWARDS MAY DISCOURAGE VOLUNTARY CHANGES THAT SCHOOL DISTRICTS OTHERWISE WOULD BE WILLING TO MAKE.

The prospect of enhanced fee awards based on results obtained as proposed by the Eleventh Circuit also cuts directly against express public policy underlying § 1988 by punishing governmental entities who voluntarily modify policies and practices to benefit putative plaintiffs above and beyond what might be provided from litigation. The present case dramatically illustrates this point.

In the present case the District Court multiplied the base fee award by 1.75, effectively enhancing it by 75% to reflect the quality of the representation and because "the evidence establishes that plaintiffs' success in this case was truly exceptional." *Perdue*, 532 F.3d at 1218. In fact, the District Court went so far as to note that "even if the plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." *Id.*, 1229.

It is not uncommon in civil rights litigation for the mere filing of litigation and attendant media coverage to bring about significant and warranted substantive changes to governmental policies and practices. For example, in *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human*

Res., 532 U.S. 598 (2001) following the filing of the lawsuit the West Virginia legislature "enacted two bills eliminating the 'self-preservation' requirement," thus mooting the underlying litigation. 532 U.S. at 601. Similarly, in the present case, following the filing of the litigation, the State of Georgia made substantial changes to its foster care system. The District Court itself noted that these changes went beyond anything that could have been awarded on the merits of the litigation. As noted in Georgia's Brief to the Eleventh Circuit, "[e]ven before settlement, State Defendants had made great strides to improve Georgia's child welfare system, and the District Court emphasized that '[i]t is a tribute to all concerned that such a just settlement was consummated' [Doc. 486-Pg. 14]." Brief for the Appellant, at 50-51.

The unique civic role of our Nation's schools, serving every community with doors open to all, subjects them to potential claims from all fronts on many sensitive and controversial issues. Frequently in these cases, school districts will agree to settlements that provide remedies that not only resolve the case for the named litigants but also bring about changes in policy, programs and practices that have a wider impact on the school system and its surrounding community. For example, the Rapid City school board in South Dakota recently agreed to settle a lawsuit brought by a pro-life group that had sued the district over its facilities use policy, claiming the district engaged in viewpoint discrimination based on the group's anti-abortion stance. Under the settlement, the board revised the policy that governs use of school facilities

by outside groups to include clear and neutral language on how to handle certain political topics. *See* Gahagan, K. *Revised policy aims to settle school lawsuit*, RAPID CITY JOURNAL, (April 2, 2009), available at http://www.rapidcityjournal.com/articles/2009/04/02/news/local/doc49d3f361e222e698885492.txt.

In another First Amendment case, a Delaware school district agreed to revise its policies on religion as part of a settlement with two Jewish families who had sued over the pervasiveness of Christian prayer and other religious activities in the schools. As a result of the settlement, the district agreed to amend its religion policy to clarify what practices are constitutional and send a detailed list of "real world examples" to staff members and parents, including situations like prayer before sports events and the distribution of religious materials at schools. The accord stipulated that school officials may not organize prayer at graduation. Under the changed policy, individuals can complain anonymously about violations about religious liberty or any other policies. *See* Banerjee, N. *School Board to Pay in Jesus Prayer Suit*, NEW YORK TIMES (Feb. 28, 2008), available at http://www.nytimes.com/2008/02/28/us/28delaware.html?ex=1361854800&en=89c181a811756868&ei=5088&partner=rssnyt&emc=rss.

In a class action lawsuit alleging discrimination against Native American students, the Winner School District in South Dakota agreed to settle the case to avoid prolonged and expensive litigation that would be detrimental to the students' educational needs. The district agreed to numerous changes that included steps to improve graduation

rates, to reduce disciplinary incidents and to integrate the Native American culture and history into the curriculum. *See* Associated Press, *Settlement reached in South Dakota student discipline lawsuit*, NEWS FROM INDIAN COUNTRY (June 18, 2007), available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=734&Itemid=109.

There can be no real dispute that the Nation's civil rights laws ought to encourage governmental entities to take prompt voluntary actions to remedy circumstances such as those noted above. Practices that deter such prompt voluntary remedial actions unquestionably run counter to the policy underlying these federal laws, which is to remedy these situations as promptly as possible. This is particularly true in school cases involving the education of school children, where legal delays work to the detriment of the individual child and the school system as a whole. For example, under the IDEA, disputes about appropriate educational service for children with disabilities are best resolved without invoking administrative or judicial proceedings so that the child starts receiving the needed services as soon as possible. In fact, the statute encourages early resolution and provides for tight timelines and many opportunities for parents and schools to reach agreement, thereby averting the need for formal litigation. Schools readily understand and welcome these opportunities for collaboration and frequently reach mutually acceptable settlements. However, if this Court adopts the Eleventh Circuit's approach, schools, out of fear of future enhancement awards, may become more wary of making concessions or providing more

than the law actually requires. Clearly, this would be to the detriment of the children whom the IDEA is intended to benefit.

In the present case, the District Court effectively punished the State of Georgia for going "above and beyond" what was sought in the litigation. When Georgia voluntarily took steps above and beyond what could have been recovered in this litigation to fix what was, by all accounts, a seriously broken foster care system, it got slapped with a 75% penalty for doing so. An enhanced fee award based on results in similar situations sends school districts the message that it may be better to take their chances at trial rather than voluntarily offer changes that the district recognizes are in the best educational interests of the children they serve but are beyond what the law would specifically require. This result gives the plaintiffs, at best, only the relief available on the merits and at worst much less than the school district might have been willing to do absent the prospect of a performance enhancement award. To give any more is to subject the district to a potentially devastating enhancement award that devours taxpayer funds intended for education.

The simple fact is that the Eleventh Circuit's proposed enhanced fee approach creates one big winner—attorneys—and a whole lot of losers, including taxpayers and the very citizens that these attorneys are purporting to protect. In this case the biggest losers would be the foster children in the State of Georgia who, if this Court adopts the Eleventh Circuit's approach, will see $4.5 million in

scarce resources leave the foster care system and go to pay attorneys a huge bonus. The other big losers are children in future cases who will not reap the benefits that would otherwise come when school districts and other governmental entities settle cases like this with voluntary changes in practices and procedures that go above and beyond the relief requested. This was certainly not the result Congress intended when it enacted § 1988 and added fee-shifting provisions to other federal laws.

CONCLUSION

For these reasons, *Amicus* urges the Court to follow its precedent and determine that a "reasonable fee award" under 42 U.S.C. § 1988 may not be enhanced solely based on the quality of performance and results obtained since these factors are already included in the lodestar calculation.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF GEORGIA, ET AL.,
PETITIONERS

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR NATIONAL SHERIFFS' ASSOCIATION ET AL. AS AMICI CURIAE SUPPORTING PETITIONERS

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONERS

The National Sheriffs' Association ("NSA") respectfully submits this *amici curiae* brief in support of Petitioners Sonny Perdue, Governor, et al. Pursuant to *Supreme Court Rule 37.2.(a)*, counsel of record have received timely notice of the intent to file the brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Sheriffs' Association is a *§ 501 (c)(4)* non-profit association, formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriff throughout the United States. The NSA has over 21,000 members, and is the advocate for 3,088 sheriffs throughout the United States.

NSA promotes the public interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are affected.

The vast majority of the damages lawsuits brought against sheriffs and their deputies throughout the United States are brought in both federal and state courts under federal statutes that contain fee shifting provisions, primarily *42 U.S.C. §§ 1983 and 1988*. The Court's ruling on the appropriateness of a trial court enhancing an award of attorney's fees will necessarily have broad reaching affect on sheriffs and their

deputies. The awarding of enhanced and excessive attorney's fees has a direct impact on the budgets and costs in the operation of our Nation's jails as well as in the management of our Nation's offices/departments of Sheriff.

To defend against these lawsuits, as will come as no surprise to this Court, sheriffs and their deputies often assert the defense of "qualified immunity." A denial of qualified immunity, at any stage of the litigation, is subject to immediate appellate review, necessarily incurring additional attorney's fees for each party. Allowing a trial court to enhance an award of attorney's fees to a prevailing party under §1988, simply because the trial court's opinion of plaintiff's counsel's performance is greater than that "expected" by the trial court bestows upon the trial court the power to assess punitive damages under an otherwise compensatory statute. Such a ruling would have a chilling effect on sheriffs and their deputies out of financial concerns for the ever-shrinking budgets of their departments/offices rather than their legal right to immunity. Fear of heavy "enhanced fee awards" made with the unbridled "discretion" of the district court would ripen and the pursuit of immunity-from-suit for lack of clearly violated constitutional rights would wither. America's sheriffs should be encouraged in, not dissuaded from, establishing instances in which their immunity shields them from vexatious litigation. Apprehension and fear of the possibility that a trial court may enhance a fee by any amount it deems reasonable while acting as a witness for a plaintiff without opportunity for cross examination or any due process in violation of the *5th Amendment* will force an unduly restrictive approach to defending sheriffs from

constitutional attacks. Consequently, the public's faith and support of sheriffs will weaken. As a matter of public policy sheriffs should be encouraged to act when enforcing the law without the fear of personal liability. The failure of the Eleventh Circuit to reverse the trial court's grant of "enhanced" attorney's fees, under the facts of this case, further erodes this public policy, which this Court has consistently maintained.

The decision in this case, if not reversed, could have far-reaching adverse effects on the over three thousand sheriffs in our Nation.

SUMMARY OF ARGUMENT

This Court should reverse the Eleventh Circuit to conclusively establish that it is inappropriate for a trial court to enhance an award of attorney's fees under a federal fee shifting statute based solely on quality of performance and results obtained when these factors are already included in the lodestar calculation. Such an enhancement amounts to a windfall to the prevailing party's attorneys in contravention of the express legislative intent of Congress in enacting *§ 1988*. This would seem to be particularly true in a case such as this where the parties entered into a consent decree that addressed the issues raised in the litigation.

1. The Court should determine that enhancement of a reasonable attorney's fee based upon the quality of performance and the results obtained amounts to "double recovery" since those factors are taken into consideration when the trial court arrives at a "reasonable" hourly rate for the work performed.

2. As applied to the facts of this case, such an enhancement would be unjust for two reasons: (1) the matter before the court was one requesting equitable relief; and, (2) the matter was resolved by consent decree. Presumably, a request for equitable relief cannot result in exceptional results, since a court is charged with narrowly tailoring an equitable remedy. Where, as here, a matter is resolved by consent decree, allowing an enhanced fee would discourage parties from entering into such an agreement.

3. As applied to the facts in this case, such an enhancement of attorney's fees is the product of the denial of due process of law. The trial judge served as the plaintiff's only witness in establishing the necessary "specific evidence" of superior service and exceptional success to support the enhancement, and was not subject to cross-examination or, if necessary, rebuttal evidence. The enhancement of fees, under such circumstances adds a punitive aspect to an otherwise compensatory statute in violation of the defendant's constitutional guarantees.

ARGUMENT

1.

Title 42 U.S.C. § 1988 provides that in civil rights litigation, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In enacting this fee shifting provision, Congress made clear its intent that the fee awarded should be "adequate to attract competent counsel, but [ ] not produce windfalls to attorneys." S.Rept. 94-1011, p.6

(1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

The case law that has developed since the enactment of § 1988 has consistently held that the initial determination of a "reasonable attorney's fee begins with the application of the "lodestar" figure. *City of Burlington v. Dague*,505 U.S. 557 at 562, 112 S.Ct. 2638 at 2641 (1992). In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Court instructed that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, 461 U.S. at 433, 103 S.Ct. at 1939.

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984), and *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088 (1986), retained the lodestar as the initial calculation for a reasonable attorney's fee, but expanded on *Hensley's* proposition that a reasonable fee might require an adjustment of the lodestar figure. All of the cases, however, restate the theme that the lodestar figure generally represents a "reasonable" fee. Justice Scalia, writing for the majority in *City of Burlington* restated the proposition succinctly: "We have established a 'strong presumption' that the lodestar represents a 'reasonable' fee, ... and have placed upon the fee applicant who seeks more than that the burden of showing that 'such an adjustment is *necessary* to the determination of a reasonable fee.'" *City of Burlington, supra*, at 505 U.S. at 562, 112 S.Ct. at 2641 (internal citations omitted).

Blum specifically cautioned that "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Blum, supra,* 465 U.S. at 900, 104 S.Ct. at 1549-1550. *Delaware Valley* went further by stating: "[i]n short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Delaware Valley, supra,* 478 U.S. at 566, 106 S.Ct. at 3098.

In the instant case, the trial judge considered the skill and experience of the attorneys handling the case, as well as the results obtained, when he determined that hourly rates of up to four hundred ninety-five dollars were reasonable. *See, Kenny A., et al. v. Perdue, et al.*, 454 F.Supp. 2d 1260 at 1284 - 1286 (2006). In fact, the trial judge speculated that the lodestar figure of more than six million dollars roughly equaled what the State would have expended on legal fees if it had been required to pay market rates. *Id.*, at 1287-1288. Given those findings by the trial court, it is not possible for the fee applicant to have met the burden of proof established by *Blum* and *City of Burlington;* that such an adjustment is *necessary* to the determination of a reasonable fee.

The trial court's enhancement of the fee by four and one-half million dollars is precisely the type of "windfall" that the Congressional record cautioned the courts to avoid. As the Court noted in *Delaware*

Valley:

> These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. *Delaware Valley, supra,* 478 U.S. 565, 106 S.Ct. at 3098.

2.

The fee enhancement is even more inappropriate where, as here, the relief sought was equitable in nature. As Judge Tjoflat pointed out in his dissent to the denial of rehearing *en banc*, it is difficult to rationalize the trial court's assessment of counsel's performance as exceptional in a case that sought injunctive relief. *Kenny A. v. Perdue,* 547 F.3d 1319 at 1330 (2008) ("... in the context of equitable relief, no properly-crafted injunction can be more "exceptional" than or "superior" to any other."). Because the trial court is presumably striving to narrowly tailor an order to effectuate the appropriate relief, any results obtained that exceeded the expected outcome would be incompatible with the goals of equity. Again, Congress' stated objective in enacting Section 1988 is not to reward the prevailing attorney, but simply to ensure access to competent counsel. The more than six million dollars awarded as the lodestar figure more than satisfied that goal.

Further, the underlying issues were resolved by the entry of a consent decree. To allow an enhancement after the parties negotiated a settlement would serve as a disincentive for parties to reach a compromise agreement. Apparently, if the petitioners in this case had not agreed to the consent decree crafted by the parties, the ultimate relief granted would have been less. *See, Kenny A., et al. v. Perdue, et al.*, 454 F.Supp. 2d 1260 at 1289 (2006). ("Indeed, the Court has previously recognized that even if Plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the consent decree.").

Presumably, the governmental defendants determined that the vast sums required to litigate the matter could be better devoted to trying to alleviate the problems that led to the litigation in the first place. By allowing an enhancement of the prevailing party's attorneys' fees, the trial court is signaling to other potential defendants that it is better to fight it out in court than to settle. Such a result wastes not only the precious resources of the parties, but that of the court system as well.

Similarly, an enhanced fee awarded against a governmental entity seems to run contrary not just to the expressed intention of Congress in the legislative history behind Section 1988, but also to the public policy behind the line of cases that extend from *City of Newport v. Fact Concerts*, 453 U.S. 247 at 266-267, 101 S.Ct. 2748 at 2759-2760 (1981). While an enhanced fee is not technically an award of punitive damages, it would have the same effect on the public treasury.

3.

The trial court enhanced its fee award by a multiplier of 1.75 ($4,500,000.00) based on three key areas of "specific evidence": the superior quality of service provided by plaintiff's counsel, the court's personal observation of the performance by plaintiff's counsel, and the truly exceptional success achieved by plaintiff's counsel. *Kenny A.*, 454 F. Supp.2d at 1288-89.

First, the trial court relied on the following factors to demonstrate that the lodestar calculation was insufficient to fully compensate plaintiff's counsel for the high quality of service it provided: "(1) the fact that counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an ongoing basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case." *Id.* at 1288. The circuit court noted in its opinion in, *Kenny A.*, 532 F.3d at 1225-1228, that none of these factors would legally permit a trial judge to enhance the requested attorney's fee. The circuit court's holding in that regard relied upon this Court's ruling in *Delaware Valley, supra.* Consequently, the only remaining "specific evidence" left to properly support the trial court's fee enhancement was the trial judge's own "personal observation" of the performance by plaintiff's counsel and the trial judge's own opinion of the "truly exceptional success" achieved by plaintiff's counsel. *Kenny A. at 1225-1228.*

To support its inclination that the plaintiff was given a "superior" quality of service, the trial judge opined,

> "Quite simply, plaintiff's counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289.

The trial court then used its own opinions as to counsel's competence as evidence to support the fee enhancement. Despite "professional conduct", "dedication" and "commitment" being required of all attorneys in all cases by *Georgia Rules of Professional Conduct 1.1, 1.3, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1 & 4.2*, the trial judge found these requirements overly fulfilled in this case. Yet, the defendants were not afforded any opportunity to cross examine the trial judge as to the facts he used to form the basis of his opinions or, better still, even question what he witnessed in the way of representation provided by other attorneys to their clients in his past 27 years on the bench. As a result, *ex parte* evidence not given under oath[1] or subject to cross examination was used to justify the fee enhancement.

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[1] Amici Curiae does not suggest or otherwise imply that the trial court judge was not truthful in his beliefs and opinions regarding the performance of plaintiff's counsel when it points out that those opinions were not given under oath on the record and subject to cross-examination.

Furthermore, since the trial court's statement is entirely subjective in nature, it could not qualify as evidence admitted pursuant to "judicial notice". According to *Fed. R. Evid. 201(b)*, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Here only one of two results is possible. Either the trial court relied on its own subjective opinions without affording defendants any right of cross examination, or it took judicial notice of a fact not subject to such notice, thereby denying defendants a procedural protection guaranteed by *Fed. R. Evid. 201(b)*. In either instance, due process of law was denied to the defendants with regard to the "specific evidence" finding necessary to enhance the attorney's fees award. The enhancement is therefore not proper and should be reversed by this Court.

The trial court also supported its conclusion that plaintiff's counsel achieved "truly exceptional success" on its own "personal observation". Naturally, the same procedural and due process deficiencies arise in the lower court's analysis of success achieved by plaintiff's counsel. Since the trial court did not offer any previous case which was tried before it during the last 27 years as a comparative example, no factual basis was given as to how its conclusion that plaintiff's counsel achieved "truly exceptional success" was provided. And, again, the defendants neither had the opportunity to attack that factual basis through cross examination nor were they allowed to question the trial judge, as the primary witness for the plaintiff, as to which facts formed the

basis of his lauding plaintiff's counsel's representation. The defendants were deprived of all due process to challenge or impeach any of the trial court's determinations and opinions on the matter.

In a lawsuit which seeks mainly equitable relief, it hardly seems possible to achieve "truly exceptional success". Unlike a suit for monetary damages in which a plaintiff seeks an unspecified amount to be determined by the trier of fact, either "narrowly tailored" equitable relief is awarded by the court or it is not. Yet, even assuming that such success was achieved here, the defendants were not allowed to question the basis of such a determination through cross examination. Instead, the trial judge acted as the primary witness for the plaintiff and, did so after all arguments on the issue were closed, leaving the defendants powerless to attack his testimony.

This Court, in *Blum* and *Delaware Valley*, held that an upward adjustment in the lodestar for the quality of representation "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and that success was exceptional." Under a proper procedural and constitutional analysis such "specific evidence" should be derived with due process of law and in compliance with the procedural protections guaranteed by the *Federal Rules of Evidence*. Using the personal observations of the trial judge to support the enhancement of the fee awarded to plaintiff's counsel, under the facts of this case, is the product of the denial of due process of law by the trial court.

CONCLUSION

The Court should reverse the Eleventh Circuit's decision to allow an enhancement of the prevailing party's attorney's fees, and should conclusively establish that an enhancement based solely on quality of performance and results obtained can never be the basis for enhancement when these factors are already included in the lodestar calculation.

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AMICUS CURIAE BRIEF

No. 08-970

In the
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,
Petitioners

v.

KENNY A., by his next friend Linda Winn, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION, THE PENNSYLVANIA STATE BAR ASSOCIATION, THE OHIO STATE BAR ASSOCIATION, THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, THE IOWA STATE BAR ASSOCIATION, THE TENNESSEE BAR ASSOCIATION, THE WASHINGTON BAR ASSOCIATION, AND THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can an attorney's fee award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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INTERESTS OF AMICI CURIAE

Amicus curiae the New York State Bar Association, together with the Pennsylvania State Bar Association, the Ohio State Bar Association, the Bar Association of the District of Columbia, the Iowa State Bar Association, the Tennessee Bar Association, the Washington Bar Association, and the American Association of Jewish Lawyers and Jurists, submit this brief in support of the Respondents.[1] *Amici* are voluntary bar associations whose members serve in the private, public, and non-profit sectors of the bar and include attorneys who represent both plaintiffs and defendants in actions brought under numerous federal fee-shifting statutes. They take this opportunity to express their views to the Court because the public policy reflected in such fee-shifting statutes – which favors attracting competent counsel to represent citizens in cases affecting the public interest – are important to the *amici* and their members in various ways.

Among the concerns of each of the *amici* is to increase access to the civil justice system for those

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[1] This *amicus* brief is filed with the consent of the parties and letters confirming that consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Descriptions of the individual *amici* are included as an Appendix to this brief. Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial or government official member of any of the *amici*.

who cannot afford counsel. *Amici* and their members are "mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance" and seek "to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." *Model Rules of Prof'l Conduct*, Preamble. Fee-shifting statutes such as 42 U.S.C. § 1988 are among the most important public policies supporting access to our civil justice system. *Amici* believe that such policies are particularly needed where, as here, the representation made possible by the particular statute permits individuals to vindicate important constitutional and civil rights.

Furthermore, most of the *amici* associations have members who invoke the attorney's fee provisions of 42 U.S.C. § 1988 and other federal fee-shifting statutes in their legal practice. On a daily basis, these members assist clients who would not otherwise be able to afford counsel to vindicate those clients' rights, thereby advancing the important public policies that those rights embody. *Amici* do not believe that under the current state of the law statutory fees overcompensate attorneys for pursuing these types of litigation matters. Rather, *amici* believe that the present availability of upward enhancements to the lodestar calculation of attorney's fees in extraordinary cases is both necessary and appropriate to the statutory purpose of attracting counsel to help enforce our nation's civil rights laws.

SUMMARY OF THE ARGUMENT

Congress's intent in passing Section 1988 – which provides for the award of legal fees to prevailing parties – was to attract private lawyers to take on important civil rights litigation. Allowing upward enhancements of lodestar fee awards in extraordinary circumstances is both consistent with this legislative policy and with the statutory measuring stick of "reasonable attorney's fees." In particular, maintaining the limited availability of upward adjustments to the lodestar is necessary to counterbalance the disincentive to taking on civil rights cases which flows from the ability to reduce lodestar fees for limited success. Fee enhancements for extraordinary performance and results are also necessary where achieving such results requires an extraordinary investment of time and financial resources; this greatly increases the cost to the attorney created by the delay in payment inherent to the fee-shifting system.

Additionally, granting enhancements of lodestar fees reflects the increasing acceptance in the private marketplace of success fees and similar alternative billing arrangements. Such upward adjustments to the attorney's standard fee were commonly available in the private legal market when Section 1988 was passed and are on the rise again today. Since the reasonableness of legal fees under federal fee-shifting statutes is largely tied to experience in the private market, this Court should not accept Petitioners' proposed bright-line rule which would eliminate all lodestar fee enhancements.

ARGUMENT

I. Granting Enhancements to Lodestar Fee Awards in Extraordinary Cases Fulfills Congress's Purpose of Attracting Competent Counsel to Represent Civil Rights Plaintiffs

Congress's intent in providing for awards of reasonable attorney's fees to prevailing parties under 42 U.S.C. § 1988 was to attract competent private counsel to accept civil rights cases. As *amici* explain below, granting enhancements of lodestar fees in extraordinary circumstances is consistent with this legislative intent.

A. Congress's Purpose in Section 1988 Was To Encourage Enforcement of the Civil Rights Laws By Giving Private Attorneys Meaningful Incentives to Accept Civil Rights Cases

Section 1988 exists not to reward lawyers, but to enable citizens to vindicate their civil rights and thereby enforce our nation's civil rights laws. This purpose is manifest in the statutory text, which indicates that attorney's fees are provided "to *enforce*" certain federal civil rights statutes. 42 U.S.C. § 1988(b) (emphasis added). The legislative history of Section 1988 confirms that Congress's primary goal in this fee-shifting provision was to foster meaningful private enforcement of the law. *See* S. Rep. No. 94-1011, at 2 (1976) (explaining that the "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a

meaningful opportunity to vindicate the important Congressional policies which these laws contain"); H.R. Rep. No. 94-1558, at 1 (1976) (noting that "enforcement of Federal civil rights statutes depends largely on the efforts of private citizens," and that Section 1988 was necessary to give effect to such enforcement "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel").

As Respondents describe in their brief, Congress believed that lodestar fee enhancements for excellent performance of and extraordinarily results obtained by counsel were consistent with its goal in enacting Section 1988. Respondents' Br. at 20-31. Notably, the Senate Judiciary Committee, in an analysis that this Court has repeatedly treated as authoritative, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984); *Blanchard v. Bergeron*, 489 U.S. 87, 92 (1989), noted that two lower court cases granting such fee enhancements had "correctly applied" the "appropriate standards" for the reasonableness of attorney's fees. S. Rep. No. 94-1011, at 6.[2] This fact alone should answer the question presented on this appeal.

What *amici* particularly wish to emphasize here is the reason the Senate Judiciary Committee gave for endorsing these cases: They "resulted in fees which are *adequate* to *attract* competent counsel, but which do not provide windfalls to attorneys." *Id.* (emphasis added); *see also* H.R. Rep. No. 94-1558, at 9 (application of proper standards for reasonable legal

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[2] The two cases relied on are *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 687-88 (N.D. Cal. 1974), and *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5048 (C.D. Cal. 1974).

fees will "ensure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys"). Logically, the promise of reasonable attorney's fees can only "attract" attorneys before they have agreed to accept a particular legal representation. That is the point at which an attorney weighs the various factors relevant to taking on a case, such as: the amount of work likely to be involved, the degree of complexity of the litigation, the chances of success, the litigation costs, and the level of compensation available. As a result, interpreting Section 1988 in light of its legislative purpose requires that attention be paid to the effects of the statute on private attorneys' *prospective* willingness to accept civil rights cases.

A categorical rule against lodestar enhancements, such as Petitioners advocate, would deter competent counsel from taking on the sorts of expensive and important litigations at issue here. In contrast, the current rule permitting such fee enhancements in narrowly-circumscribed sets of extraordinary cases helps attract counsel to these cases while permitting courts to closely police against "windfall" awards to lawyers. This was precisely the intent of Congress.

B. The Availability of Lodestar Fee Enhancements for Extraordinary Performance and Results Attracts Competent Counsel To Take on Financially Undesirable Cases Without Providing Windfalls to Attorneys

The potential for enhanced fee awards in extraordinary cases is necessary to attract counsel to take on important civil rights cases – such as the case at bar – which require large expenditures of time and money to prosecute but do not present the prospect of significant damages awards.

It is commonly known within the bar that civil rights cases which have high litigation costs and low potential for damages awards are frequently economically unfeasible regardless of their merit. *See* Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197, 229, 234-35 (1997). Civil rights class actions, such as the present case, are particularly marginal from an economic perspective, and as a result have declined substantially in recent years. *See* Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Rep. to the Fed. Judicial Ctr.* (2008), at 5 (civil rights class action declined from a total of 14.2% of federal class action filings in 2001 to 6.9% in 2007).

While this Court has limited the circumstances under which lodestar fee enhancements are available, it has never posited that lodestar awards alone are necessarily adequate to attract competent counsel to meritorious cases.

The Court addressed the economic consequences of legal fee awards most recently in *City of Burlington v. Dague*, 505 U.S. 557 (1992), in which it rejected the use of lodestar fee enhancements to compensate attorneys for the fact that fee awards are contingent on success. The Court acknowledged that part of the risk inherent in fee-shifting

litigation "is not reflected in the lodestar." *Id.* at 563. But it concluded that contingency fee enhancements were unworkable in practice and inconsistent with Section 1988's limitation of fee awards to prevailing parties. As the Court noted, if the magnitude of the contingency enhancement depended on the likelihood of success in the particular case, this would have the perverse effect of awarding higher fees for, and thereby encouraging, relatively meritless claims. *Id.* at 563. If, on the other hand, the enhancement were calculated according to the risks of contingency cases "considered as a class" – as the *Dague* dissent suggested, *id.* at 570 (Blackmun, J., dissenting) – this would lead to systematic overcompensation for claims that were less risky than average. *Id.* at 565 (majority opinion). Most importantly, the Court concluded that contingency enhancements would "in effect pay for the attorney's time" in cases "where his client does *not* prevail," contrary to the statutory limitation of fees to prevailing parties. *Id.* (emphasis in original).

In contrast, lodestar enhancements for extraordinary performance and results avoid these problems of contingency enhancements. Rather than encouraging attorneys to take risks on longshot cases having little merit, fee enhancements for extraordinary results encourage lawyers to seek out the most meritorious cases with the highest likelihood of achieving "exceptional success." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). And, because fee enhancements for exceptional service are confined to the "rare case where the fee applicant offers *specific evidence* to show that the quality of service rendered was superior to that one reasonably

should expect in light of the hourly rates charged," they do not pose the concern identified in *Dague* of systematic overcompensation and do not permit enhancements that would be unwarranted in the particular case. *Blum*, 465 U.S. at 899 (emphasis added).

While contingency enhancements could not easily be cabined, *Dague*, 505 U.S. at 565, this Court has long placed strict limits on the availability of lodestar fee enhancements for quality of representation or results obtained. Indeed, the Court has itself twice struck down lodestar enhancements that failed to meet its high standards without needing to adopt a categorical rule disallowing such fees in all cases. *Blum*, 465 U.S. at 899-900; *Pennsylvania v. Delaware Valley Citizens' Council* (*Delaware Valley I*), 478 U.S. 546, 566-568 (1986). There is simply no evidence that the limited availability of such fee enhancements has led to the widespread "windfalls" of which Petitioners and their *amici* complain. *See* Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 U.C.L.A. L.Rev. 825, 840 (2004) (finding that in 2000-01, California "federal courts did not award a single enhancement").

Despite their rarity, the possibility of lodestar fee enhancements provides a modest but important incentive for counsel to take on this type of important litigation. While actual awards of fee enhancements are rare, enhancements are *potentially* available at the outset of every case, when the decision to undertake the representation is made. Moreover, the odds of receiving an enhancement is perceived as being the highest in

complex, difficult cases, which are also the most financially unattractive for private attorneys to accept. *See* Davies, *Federal Civil Rights Practice in the 1990s*, 48 Hastings L.J at 229. As a result, the incentive created by the availability of fee enhancements is strongest in those cases where it is most likely to have an effect on the attorney's decision to undertake the legal representation.

At the time that class counsel signed on to take this particular case, a lodestar fee enhancement in the event of an exceptional result was an available possibility under Eleventh Circuit law. *See Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209, 1236-39 (11th Cir. 2008) (Carnes, J.). The prospective value of this possibility cannot be discounted, as the United States proposes in its brief, simply because counsel did not know at the outset whether it would actually *merit* an enhancement, or because counsel had not received one in the past.[3] United States' Br. at 28. Rather, the possibility – or impossibility – of such enhancements is part of the mix of factors that all counsel consider in deciding whether to undertake such representations.

The continued availability of such lodestar enhancements effectively leverages a small number of legal fee awards to provide a meaningful incentive for private attorneys to participate in the enforcement of federal civil rights – just as Congress intended.

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[3] United States' Br. at 28 ("Nothing in the record here . . . indicates that Children's Rights, Inc. – a public interest law firm dedicated to improving child welfare systems through litigation (Pet. App. 54a) – had received an enhancement in a prior case or expected to receive an enhancement in this one.").

C. The Availability of Lodestar Fee Enhancements for Extraordinary Results Offsets the Availability of Lodestar Fee Reductions for Limited Success

Preserving the limited availability of lodestar fee *enhancements* for extraordinary results is particularly appropriate in light of this Court's endorsement of *reductions* in lodestar fees where lawyers achieve only limited success.

In *Hensley*, this Court held that even where plaintiffs prevail, courts must examine whether they "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." 461 U.S. at 434. Where plaintiffs succeed on some claims but lose "distinctly different" and "unrelated" claims, "Congress' intent to limit awards to prevailing parties" requires that hours spent on the unsuccessful claims not be compensated at all. *Id.* at 434-35. But even where the lawsuit involves a single claim or "a common core of facts," and the plaintiff has prevailed, a lodestar reduction may be warranted based on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. As this Court ruled in *Hensley*, if the plaintiff "achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436.

Thereafter, in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court emphasized that lodestar fee reductions for limited success derive directly from Section 1988's requirement that attorney's fees be

"reasonable" and do not stem solely from the statutory limitation of fees to "prevailing parties." 42 U.S.C. § 1988(b). The *Farrar* Court thus held that a plaintiff who won nominal damages was a "prevailing party" for purposes of Section 1988 but due to the plaintiff's limited success in winning only nominal damages, "the 'only reasonable fee'" under the circumstances of the case was "no fee at all." 506 U.S. at 112, 114-16.

The combined result of *Hensley* and *Farrar* is that it is much easier for defendants to convince courts to reduce lodestar fees for limited success than it is for plaintiffs to obtain fee enhancements for extraordinary results. *Compare Hensley*, 461 U.S. at 435 (limiting lodestar enhancements based on results obtained to cases of "exceptional success") *with Farrar*, 506 U.S. at 114 (holding that "the amount of damages awarded as compared to the amount sought" is a "primary consideration" in determining reasonable fees). Consequently, lodestar reductions due to limited success appear to be significantly more common than lodestar enhancements based on extraordinary results. *E.g.*, *Kentucky Rest. Concepts Inc. v. City of Louisville*, No. 03-5748, 117 Fed. Appx. 415, 421, 2004 WL 2756966, *5 (6th Cir. 2004) (upholding 35% fee reduction where plaintiff "obtained a 'good' but not an 'excellent' result"); *Missouri Child Care Ass'n. v. Cross*, No. 04-1793, 103 Fed. Appx. 617, 2004 WL 1679474, *1 (8th Cir. 2004) (affirming 60% reduction to lodestar amount where plaintiff "had obtained both declaratory and injunctive relief, but . . . these forms of relief did not *ipso facto* assure any increases in reimbursements to the foster-care providers who are [plaintiff's] members"); *Andrade v. Jamestown*

Hous. Auth., 82 F.3d 1179, 1191 (1st Cir. 1996) (sustaining lodestar fee reduction of 91% for limited success).

This state of affairs has obvious effects on the financial calculus of private attorneys when they decide whether to accept cases in which fee awards are governed by Section 1988. Attorneys need to take into account not only their likelihood of prevailing and receiving an award of attorney's fees, but also the possibility that courts will deem any success obtained to be "limited" and therefore may award less than a full lodestar fee. This possibility makes accepting civil rights cases substantially less attractive. *See* Davies, *Federal Civil Rights Practice in the 1990s*, 48 Hastings L.J. at 234-35 (noting that *Farrar* has caused fee awards to be "proportional to the damages in issue" and that as a result "some types of civil rights cases are not economically feasible").

If this Court were to eliminate the modest upside potential that results from the availability of fee enhancements in "exceptional" cases, it would further diminish the attractiveness of low- or no-damage cases and would conflict with Congress's purpose in passing Section 1988. *See* H.R. Rep. 94-1558, at 9 (where damage remedies are limited, "awarding counsel fees to prevailing plaintiffs . . . is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected").

Accordingly, the practice of reducing lodestar fees counsels in favor of retaining lodestar enhancements in extraordinary cases.

D. Lodestar Fee Enhancements Encourage High Quality Legal Representation Where Such Representation Requires Extraordinarily Large Upfront Expenses

The availability of lodestar fee enhancements is particularly necessary where, as here, providing high-quality legal representation requires an exceptionally large upfront investment of attorney time and financial resources.

As the district court noted, a key component of the "superior" service rendered by class counsel in this case was "their extraordinary commitment of capital resources." *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1288 (N.D. Ga. 2006). In particular, class counsel worked more than 30,000 hours without remuneration, and advanced more than $1.7 million in out-of-pocket litigation expenses, including expert witness fees. *Id.* These resources were invested over the course of four years from the filing of the complaint to the district court's legal fee decision. *Id.* Such extensive investment of resources is highly unusual in civil rights litigation – particularly where injunctive relief is the only remedy sought – and it is exactly this sort of economically difficult representation that Section 1988 is intended to facilitate.

Even with the promise of statutory attorney's fees, taking on these types of large-scale, capital-intensive civil rights cases is a highly unattractive financial proposition. Expert fees are not reimbursable under Section 1988. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991). As a result, even in the best-case

scenario where the plaintiff prevails and the attorney is compensated at market rates for all hours worked, the attorney's net return after a lodestar award will be significantly less than what the lawyer could make in the market from paying clients. *See* Davies, *Federal Civil Rights Practice in the 1990s*, 48 Hastings L.J. at 229 ("[i]n cases that are expert-intensive and in which expert witness fees are not recoverable . . . the lack of a multiplier can be devastating" to civil rights practitioners). Should the plaintiff lose, the lawyer would not only go uncompensated for the immense amount of attorney and staff time such cases require, but would also lose the capital expenses invested in the case.

While lodestar enhancements cannot compensate for expert fees or the risk of loss, they can and should address the true costs to attorneys in extraordinary cases that require advancing and carrying thousands of hours and hundreds of thousands of dollars in expenses during drawn-out complex litigation.

This Court has already recognized as much in *Missouri v. Jenkins*, 491 U.S. 274 (1989), where it held that such fee enhancements to compensate for delayed legal-fee payments are appropriate. In *Jenkins*, the Court approved the use of current rather than historic hourly rates as "an appropriate adjustment for delay in payment." *Id.* at 284. Contrary to Petitioners' arguments, *Jenkins* left the door open for other sorts of enhancements to the lodestar calculation as well. *See id.* (holding that "an appropriate adjustment for delay in payment – whether by the application of current rather than historic hourly rates *or otherwise* – is within the

contemplation" of Section 1988) (emphasis added). In fact, in *Jenkins* itself, the Court upheld an award in which an attorney's hourly rates were set above the highest current rates charged in the market, in part due to the delay in payment. *See id.* at 277.

As the district court correctly recognized here, even using current hourly rates in the lodestar calculation failed to compensate class counsel adequately for the delay in payment of their massive investment of attorney time, much less for the cost of financing their large outlays of (partially non-reimbursable) litigation expenses. While the expenses incurred in ordinary civil rights cases can often be absorbed into the operating budget of a law firm, investing time and money on the scale involved here represents an extraordinary undertaking; it carries the possibility of an extraordinary result, but with similarly extraordinary opportunity costs and carrying costs. *See* Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 Brook. L. Rev. 281, 321-322 (2003) ("using current rather than historic hourly billing rates[] often fails to fully compensate for the delay" because the "interest rate for borrowing money exceeds the rate of inflation and likely exceeds the increase in hourly rates over time").[4] If attorneys are unwilling to carry such

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[4] As the present case demonstrates, the delay in payment frequently continues long after the initial fee award by the district court, as the defendants often exercise their rights to appeal. During this period, the potential award may remain unchanged or may increase only at a statutory interest rate that is significantly lower than the actual cost of such delay to the attorneys involved.

costs, they will be hard-pressed to develop the case, let alone deliver the extraordinary quality and results that the district court identified here.

When civil rights attorneys do what it takes to achieve an excellent outcome for their clients, they should receive a "fully compensatory fee," including compensation for the actual costs of fronting large litigation expenses over a number of years. *Blum*, 465 U.S. at 901 (quoting *Hensley*, 461 U.S. at 435).

* * * *

Therefore, retaining the availability of legal fee enhancements advances Congress's purpose of incentivizing counsel to take on important civil rights representations.

II. Lodestar Fee Enhancements Are Consistent with Practices in the Private Legal Market

Petitioners' proposed categorical rule against lodestar fee enhancements is inconsistent with the longstanding availability of similar arrangements in the private market for legal services. This Court has long looked to such market practices to determine the reasonableness of fees under Section 1988. To establish the lodestar fee as a strict method of calculating attorney's fees without allowing for any enhancement of those fees would ignore the experience of the private market. It would also exclude practices that were not only presumed reasonable by Congress when it passed Section 1988, but are today increasingly considered reasonable by billing attorneys and their clients.

A. Private Market Practices Are the Touchstone of "Reasonable" Fees

The reasonableness of attorney's fees under Section 1988 ultimately rests on their consistency with the private market for legal services.

In enacting Section 1988, Congress recognized that the way to attract competent counsel to take on civil rights cases is to pay them similarly to how they would be compensated elsewhere, in private practice. *See* S. Rep. No. 94-1011, at 6 (counsel for prevailing parties should be paid "as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on the matter'"). To that end, both houses of Congress emphasized that the fees awarded to civil rights attorneys should be comparable to those awarded under the antitrust laws. *See id.* (Section 1988 should "be governed by the same standards" as equally complex federal litigation such as antitrust and should "not be reduced because the rights involved may be nonpecuniary in nature"); H.R. Rep. No. 94-1558, at 8 ("[C]ivil rights plaintiffs should not be singled out for different and less favorable treatment."). Then, as now, fees awarded to antitrust litigation counsel were in line with what private attorneys earned in other commercial litigation matters. *See* Respondents' Br. at 26-30.

In *Blum v. Stenson*, this Court confirmed that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. In reaching this conclusion, the Court rejected the argument that fees awarded to non-profit attorneys should be governed by cost rather than the private

market, noting that "policy arguments" concerning the purported shortcomings of this approach "should be addressed to Congress, rather than to this Court." *Id.* at 895-96. The Court thus confirmed what is apparent from the legislative history and implicit in the statutory text, *i. e.*, the reasonableness of fees under Section 1988 turns largely on what is considered reasonable in private practice.[5] It follows that the history of and trends in private billing practices are relevant both to the meaning of Section 1988 when it was passed and to the meaning of a "reasonable attorney's fee" today. These considerations weigh heavily against Petitioners' proposed categorical ban on lodestar fee enhancements.

B. Hourly Billing Is a Relatively Recent Phenomenon that Was Not Fully Established When Section 1988 Was Passed

This Court's adoption of a strong presumption in favor of the lodestar fee reflects the current predominance of hourly billing in private legal practice. *See Blum*, 465 U.S. at 895 n.11 (noting

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[5] Federal fee-shifting statutes such as Section 1988 are not "intended to replicate *exactly* the fee an attorney could earn through a private fee arrangement with his client." *Delaware Valley I*, 478 U.S. at 565 (emphasis added). That would be impossible, since the purpose of Section 1988 is to extend the private market where it otherwise would not exist. *See Dague*, 505 U.S. at 564. But where, as here, reliance on the private market is both feasible and consistent with Section 1988's limitation of fee awards to "prevailing parties," the private experience deserves great weight. *See Blum*, 465 U.S. at 895 n.11; Respondents' Br. at 49-51.

that in "private practice" the "fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate"). But this was not always so. In fact, hourly billing for legal fees did not establish itself as the presumptive method of billing until the second half of the 20th century, and in its strict form had not achieved dominance by the time Section 1988 was enacted in 1976. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 800-01 (2002). For much of the history of the legal profession, performance and results have figured prominently in the calculation of attorney's fees.

In colonial times, attorney's fees were set according to fixed schedules established by state regulations. *See* Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 10-11 (1996). These fees were often supplemented by gratuities from satisfied clients. *Id.* at 11. Fee schedules gradually fell into disuse through the 19th century, and were replaced by such alternative arrangements as task-billing, annual retainers, and imprecise assessments of value which have been described as the "eyeball procedure." *Id.* at 14 (internal quotation marks omitted).

In the early 1900s, many state bars resurrected fee schedules as voluntary minimum fees, and these – along with the "eyeball procedure"– remained the most common methods of billing until the mid-twentieth century. *Id.* at 14-16. Under these arrangements, performance and results were not only taken into account, but were frequently the paramount consideration. As the prominent attorney Simon H. Rifkind, a former federal judge

and senior partner at Paul, Weiss, Rifkind, Wharton, & Garrison LLP, recalled of his practice in the 1930s: "Billing was a fine art. We asked ourselves the question, 'What have we accomplished for the client?' When we were successful, we were very well-paid." *Id.* at 16 (internal quotation marks omitted).

Beginning in the 1940s, experts in law office management began to advocate the billable hour as a more rational form of legal fee billing and a revenue-enhancer for law firms. *Id.* at 16-17. By the early 1970s, hourly legal fee billing had become the most common billing method in the private market. *Id.* Its ascendancy was hastened by this Court's conclusion in 1975 that minimum fee schedules, the major competitor to the billable hour, violated the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *see* Robertson and Calloway, *Winning Alternatives to the Billable Hour: Strategies that Work* 16 (2008).

Through the 1970s, lawyers typically used billable hours as a starting point in preparing bills, adjusting them up or down based on other factors. Ross, *The Honest Hour* 19. Thus, the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) – which set out a twelve-factor test for determining reasonable attorney's fees and was relied on by both the House and Senate Judiciary Committees in enacting Section 1988 – was largely in tune with the fee structures in private practice at the time, if perhaps slightly behind the curve. Even the Third Circuit's decision in *Lindy Bros. Builders, Inc. of Philadelphia v. American Rad. & Stand. San. Corp.*, 487 F.2d 161 (3d Cir. 1973) –

the seminal case establishing the primacy of the lodestar calculation, *see Gisbrecht*, 535 U.S. at 801 – reflected the practices of the private market in emphasizing that the lodestar figure was a non-conclusive presumption, which could be adjusted based on other factors including the quality of the representation. *Lindy Bros.*, 487 F.2d at 168.

Thus, in 1976, when Congress enacted Section 1988, upward adjustments to lodestar fees remained common in both private practice and federal fee-shifting case law. *See* Respondents' Br. at 25, 57. Accordingly, even if this Court could disregard the legislative history in which Congress endorsed lodestar fee enhancements, reading Section 1988 to forbid such enhancements would be inconsistent with the meaning of "reasonable attorney's fees" as it would have been understood in 1976. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 292 (1995) (Thomas, J., dissenting) (noting that the "original meaning of [a] statute" depends on how its words were "understood" at the time the statute was enacted).

C. In Today's Market, Legal Fee Arrangements Increasingly Include Success Bonuses and Similar Practices

The ever-evolving nature of the legal market supports preserving the modest flexibility that existing law provides to enhance lodestar fees. Indeed, current billing practices counsel against adopting Petitioners' proposed bright-line rule, which would enshrine in federal law the possibly

fleeting dominance of the billable hour approach to legal fees.

In the years after Section 1988's enactment, the billable hour continued its ascent, and straight hourly billing became increasingly common. Ross, *The Honest Hour* 18. It was against this backdrop that the lodestar method "achieved dominance in the federal courts," *Gisbrecht*, 535 U.S. at 801, evolving from "the most useful starting point" in *Hensley*, 461 U.S. at 433, to a "presum[ption]" in *Blum*, 465 U.S. at 897, to a "strong presumption" in *Delaware Valley I*, 478 U.S. at 565. While Petitioners urge the Court to take the next step in this apparent progression and turn the lodestar calculation into a virtually conclusive fee cap (although not a floor), doing so would be contrary to more recent trends in the private market for legal services.

While the billable hour is the standard method of billing in the private market, alternatives are gaining in popularity. Surveys suggest that a majority of law firms utilize non-hourly billing practices at least some of the time. *E.g.*, Graham, *Alternative Billing Increasingly Important for Texas Firms, Survey Shows*, Texas Lawyer, July 1, 2009 (80% of Texas firms surveyed used alternatives to billable hour); Hassett, *Hybrids and the Future*, Of Counsel, May 2009 (69% of firms used alternative billing practices); *Firms Not Making Dramatic Changes*, 09-7 Law Off. Mgmt. & Admin. Rep. 2 (2009) (reporting on survey which showed that "use of alternative billing is nearly universal in law firms and is expected to represent an increasing proportion of total fees collected in 2009").

In particular, alternative billing practices which combine an hourly rate with the possibility of increased payments in the event of extraordinary success are increasing in prominence. These arrangements can take many forms, including: hourly rates plus "success bonuses"; hourly rates or flat fees plus a percentage of recovery; "reverse contingency" arrangements for defense counsel, which assign to the attorneys a percentage of the recovery *below* certain benchmarks; or even retrospective assessments of value agreed between the attorney and the client. *See* Robertson *et al.*, *Winning Alternatives* 97-103. Commentators and practitioners praise these arrangements for aligning the interests of attorney and client, by tying attorney's compensation more closely to performance and results. *See, e.g.*, Taylor, *Creative, Trail-Blazing Chicago Firm Seeks to Banish the Billable Hour*, Of Counsel, August 2009; Chesler, *Kill the Billable Hour*, Forbes, Jan. 12, 2009 (advocating success fees); Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 439 n.114 (2009) (noting the increase in reverse contingency arrangements among defense counsel); McDonough, *Success Fees Can Pay Off*, ABA E-Journal Report, Oct. 11, 2002.

Whatever its ultimate outcome in the legal profession, the current rush of activity surrounding alternative billing arrangements in private practice counsels against adopting Petitioners' bright-line rule which would eliminate any upward adjustment to the lodestar calculation. Such a categorical rule would be distinctly out of synch with the current momentum in the profession. In the legal market, the equivalent of lodestar fee enhancements are seen as increasingly "reasonable" and this fact should

weigh heavily in the Court's consideration of the question presented.

Accordingly, the trend toward utilizing success bonuses and similar legal fee arrangements confirms that upward fee enhancements are appropriate under Section 1988.

CONCLUSION

The decision of the Eleventh Circuit is consistent with both congressional intent and practices in the marketplace for legal services. Given the need to incentivize counsel to take on complex civil rights litigation, the judgment on appeal should be affirmed.

August 28, 2009

Respectfully submitted,

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APPENDIX

APPENDIX

Formed in 1876 the New York State Bar Association is the oldest and largest voluntary state bar association in the nation, with more than 76,000 members. The purposes of the New York State Bar Association include to cultivate the science of jurisprudence; to promote reform in the law; to facilitate the administration of justice; to maintain the standard of integrity, honor, professional skill and courtesy in the legal profession; and to apply its knowledge and experience in the field of law to promote the public good. The programs and activities of the New York State Bar Association have served the public and improved the justice system continuously for over 130 years.

Founded in 1895, the Pennsylvania Bar Association strives to promote justice, professional excellence and respect for the law; improve public understanding of the legal system; facilitate access to legal services; and serve the 29,000 lawyers who are members of the association.

Established in 1880, the Ohio State Bar Association is an unincorporated association of more than 24,000 members. Its membership includes lawyers, judges, law students, and paralegals. The Association's lawyer members range from sole practitioners to members practicing in the nation's largest firms. Its members' practices likewise include every branch of legal service.

The Bar Association of the District of Columbia was founded in 1871 and is the second oldest voluntary bar association in the nation. The Bar

Association of the District of Columbia has several thousand members, and is D.C.'s voluntary bar. It seeks to promote civility, justice and collegiality among members of the legal profession in our nation's capital.

The Tennessee Bar Association is the largest professional association in Tennessee. Founded in 1881, this voluntary general purpose bar has more than 10,800 members from broad and diverse backgrounds.

The Iowa State Bar Association is one of the oldest voluntary state bar associations in the United States. In all, the Association includes approximately 7,800 lawyers and judges in Iowa's 99 counties and beyond.

The Washington Bar Association, an affiliate of the National Bar Association, was formed in the District of Columbia in 1925. It is one of the oldest and largest local voluntary bar associations in the country that consists primarily of African-American attorneys.

The American Association of Jewish Lawyers and Jurists is a membership organization formed in 1980 to promote and advocate the principles of traditional Jewish law, including an understanding of the relevance of Jewish law to current legal issues.

AMICUS CURIAE BRIEF

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SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE OLD REPUBLIC INSURANCE COMPANY AND NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Section 28(a) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-952 ("Longshore Act"), 33 U.S.C. § 928(a), provides that claimants for workers compensation benefits under the Longshore Act who

> have utilized the services of an attorney at law in the successful prosecution of his claim, . . . shall be awarded, in addition to the award of compensation, . . . a reasonable attorney's fee against the employer or carrier in an amount approved by the [adjudicator], . . . which shall be paid directly by the employer or carrier, to the attorney for the claimant in a lump sum after the compensation order becomes final.

This fee-shifting provision applies in claims awarded under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("BLBA"). 30 U.S.C. § 932(a), *incorporating by reference* 33 U.S.C. § 928.[2] *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 718 (1990).

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[1] Counsel for amici are the sole authors of this brief. Amici are the sole contributors to the cost of this brief. The parties' written consents to file this brief have been submitted to the Court.

[2] The same fee-shifting provision applies to claims awarded under the Defense Base Act, 42 U.S.C. §§ 1651-1654, the War Hazards Compensation Act, 42 U.S.C. §§ 1701-1706, 1711-1717, and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a.

The Old Republic Insurance Company ("Old Republic"), a subsidiary of the Old Republic International Corporation, is a commercial insurance carrier licensed in most coal mining states to insure the workers compensation liability of mine operators under the BLBA. For many years, Old Republic was the principal servicing carrier for the National Workers Compensation Reinsurance Pool and various states' residual market pools in coal mining states allowing private workers compensation insurance. Old Republic has received over 35,000 federal black lung claims since 1974, as a direct insurer, residual market (pool) servicing carrier and third party administrator. Thousands of previously filed claims remain active and thousands more are anticipated in coming years. In cases insured or administered by Old Republic, when attorney's fees are claimed under the BLBA, Old Republic defends attorney's fee applications and pays attorney's fees awarded. Old Republic's counsel respond to hundreds of fee-shifting applications each year.

The National Association of Waterfront Employers ("NAWE") is a not-for-profit trade association incorporated under the laws of the District of Columbia that represents United States private sector stevedoring companies and marine terminal operators. NAWE members load and unload vessels at the vast majority of the general marine cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, territories and commonwealths of the United States.

NAWE members are "employers" as that term is defined in the Long Shore Act: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4). Some NAWE members are "carriers" as that term is defined in the Long Shore Act: "The term 'carrier' means any person or fund authorized under section 32 of this title to insure under this chapter and includes self-insurers." 33 U.S.C. § 902(5).

In these capacities, NAWE's members defend attorney's fee applications and pay attorney's fee awards to successful claimants under the Long Shore Act. NAWE's members respond to thousands of attorney's fee applications annually.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over thirty years, this Court has endeavored to articulate an objective and easily applied standard for determining a "reasonable" attorney's fee to be applied in federal attorney's fee-shifting statutes. This has not been an easy job and it has met with persistent opposition from lawyers who want more money, judges who believe that the contingent character of a

fee-shifting recovery merits some kind of consideration, and academics who believe that certain kinds of public interest lawsuits that could be filed should be filed and that enhanced shifted fees are a reasonable price to pay to advance that objective. Amici urge this Court to stay the course with an objective standard.

Since the mid-1970's, this Court has favored the "lodestar model" as an objective way to determine "a reasonable attorney's fee" in federal fee-shifting statutes. *See Gisbrecht v. Barnhart,* 535 U.S. 789, 801 (2002). This Court has turned away most demands for a formula that considers more subjective factors like risk of loss or contingency, complexity of the litigation and other less easily defined considerations. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). This formula has been fairly easily applied by most courts, provides fair market-based compensation to attorneys, discourages insubstantial lawsuits under fee-shifting statutes, and reduces the likelihood of collateral litigation over fee awards. It does not need to be fixed.

This case asks the Court to decide whether enhancements for quality work or exceptional results ought to be available at the discretion of the courts in cases like this one that are claimed to be special. Amici believe that a departure from the basic formula to incorporate these enhancement methodologies abandons the marketplace principles reflected in this Court's prior jurisprudence in favor of an unpredictable and unfair regime that will cause perverse

consequences in many different ways. For insured programs like the black lung and longshore benefits programs, incorporation of these enhancement possibilities is likely to disrupt insuring mechanisms, cause much more fee litigation, affect settlements in Longshore claims,[3] and produce consistently unfair results that will look suspiciously like contingent fee enhancements. Over time, the "rare" exception will certainly swallow the rule.

The impact of a new fee-shifting formula permitting the consideration of inherently subjective and almost unreviewable factors such as quality and outcome would be sure to cause chaos in the black lung and longshore programs.

ARGUMENT

1. The BLBA is a federal workers compensation law that provides employer-funded benefits to coal miners and their families on account of total disability or death due to black lung disease. 30 U.S.C. § 901(a); *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S.

[3] Although not expressly prohibited by Congress, the Department of Labor takes the position that black lung claims cannot be settled and should not be settled because of a risk that employers will outsmart claimants. The courts have deferred to the Department's interpretation of the relevant provisions. *Ramey v. Director, Office of Workers' Compensation Programs*, 326 F.3d 474 (4th Cir. 2003).

135, 141-42 (1987). The Longshore Act provides employer-funded workers compensation benefits to longshore and harbor workers, and certain other persons engaged in maritime employment who suffer injury or death as a result of their employment. In 1972, Congress added a standard fee-shifting provision to the Longshore Act that also is applicable to black lung claims. 33 U.S.C. § 928, *incorporated by reference into* 30 U.S.C. § 932(a).

Black lung and longshore claims rarely present issues of great public significance and when contested, they typically involve a routine battle of the experts. There are, however, a lot of cases. In fiscal year 2005, the most recent year for which data are available, 24,980 lost time injuries were reported under the Longshore Act. Over the same time, 4,567 new claims were filed under the BLBA.[4] Since 1974, 645,385 black lung claims have been filed.[5]

If an award is warranted in a black lung or longshore case, an attorney's fee award is also available for work performed at each stage of the proceedings, which includes administrative processing, a hearing before an administrative law judge, an internal appeal to the Benefits Review Board, and an appeal as

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[4] United States Dep't of Labor, Office of Workers' Compensation Programs, ANNUAL REPORT TO THE CONGRESS FY 2005 at 31, 61 (2008).

[5] United States Dep't of Labor, Employment Standards Administration Distribution of Black Lung Claims by State, <www.dol.gov/esa/owcp/dcmwc/statistics> (last viewed June 24, 2009).

of right to a United States Court of Appeals. 33 U.S.C. §§ 919-21. Remands are frequent and it is not unusual for each claim to produce from three to five fee applications or more.

In black lung cases, there has been considerable litigation over fee enhancement for contingency or risk of losing, or quality notwithstanding this Court's holding in *Dague* as administrative law judges, and, in some instances, the courts of appeals, have sought to inject inappropriate factors to justify fee awards in excess of what the standard lodestar method would permit.[6] For example, recently, the Sixth Circuit,

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[6] Hundreds of cases are in litigation over these issues. *E.g.*, *Bolling v. Indian Mt. Coal Co.*, Case No. 2005-BLA-0537 at 3 (ALJ June 15, 2009) (stating: "Employer is correct that risk of loss may not be considered. . . . This is not to say however that an attorney may not adopt a billing rate that is sufficient to allow him to stay in business" and "The fees charged in black lung cases are what is relevant here . . . [T]here is no requirement that any rate approved fall within the range obtained by the general legal community."); *Williamson v. Robert Coal Co.*, 2005-BLA-06056, 2006-BLA-05944 at 3 (ALJ May 13, 2009) (awarding a rate that is more than the local rate because the "difficulty in prevailing in such an atmosphere is quite high."); *Parks v. Eastern Associated Coal Co.*, Case No. 2007-BLA-05276 at 3 (ALJ May 11, 2009) (awarding a fee far exceeding local rates); *Pauley v. Manning Coal*, Case No. 2003-BLA-05600 at 2 (ALJ May 8, 2009) (stating: "Employer's insistence that [counsel] establish a 'market rate' for his work in the case imposes too heavy a burden"); *Bentley v. Kentucky Elkhorn Coal Co.*, Case Nos. 2006-BLA-05737 and 2007-BLA-05333 at 2 (ALJ Nov. 5, 2008) (stating: "Additional factors that may be considered are risk of loss. . . ."); *Dye v. Farwest Coal Co.*, Case No. 2005-BLA-06152 at 4 (ALJ Jan. 29, 2009) (citing quality work and zealous

(Continued on following page)

while paying lip service to the lodestar, sanctioned the application of a special market rate for fee-shifted work in black lung claims. *B&G Mining Co. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 666 (6th Cir. 2008) (affirming awards of fees based upon an administrative law judge's past awards to other lawyers from other places in other cases that also were not supported by market evidence).

The problems confronted by employers under Section 28(a) of the Longshore Act because administrative law judges and courts decline to enforce the lodestar is rapidly becoming one of the most active litigation drivers in the black lung and longshore programs. *See, e.g., B&G Mining Co.*, 522 F.3d 657; *Christensen v. Stevedoring Services of Am.*, 527 F.3d 1049 (9th Cir. 2009); *Skike v. Director, Office of Workers' Compensation Programs*, 557 F.3d 1041 (9th Cir. 2009).

2. The addition of a quality or outcome enhancement to lodestar principles would have a chaotic effect on fee shifting in both the longshore and black lung programs. Both measures of attorney worth suggested by the decision below cannot rationally be administered by courts or agencies and both would lead to an exponential growth in the amount of fees awarded. A quality enhancement is not definable.

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representation to award a rate far in excess of a community standard).

This Court had held that a lawyer's quality is reflected in the rate that fee-paying clients are willing to pay for the lawyer's services. Beyond that proposition, any further consideration of quality of work is double-counting, not a reflection of the private market. *See Dague*, 505 U.S. at 563 *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726-27 (1987). No paying client would engage a lawyer whose reputation for quality was below par with a promise of a higher rate if the lawyer's work improved during the litigation of the particular matter. No marketplace for legal services works this way. Hourly rates are not enhanced by fee-paying clients because a lawyer wrote a great brief or delivered a stirring closing argument. It also is hard to imagine what standards or criteria a court could properly apply for determining a level of quality that justifies an enhancement. Such a proposition that lends itself to arbitrary or biased judgment raises Due Process concerns.

An enhancement for exceptional results is similarly flawed. There are no most valuable player or Academy Awards for lawyers for good reason. The best outcomes may, but do not necessarily, reflect hard, careful work by capable practitioners. Bad lawyers who do poor work may have great success and no worthy principle is served by enhancing their pay for the work. Similarly, great lawyers who always do a superb job lose cases. In the private market, lawyers are not paid less for an unsatisfactory outcome or paid more for doing the job correctly just as no one

knowingly hires a lawyer to do less than high quality work. These considerations are already reflected in the lodestar.

The marketplace recognizes unusual fee arrangements between a paying client and the attorney. It is not unheard of for a paying client to offer a lawyer an agreed upon bonus for a specified outcome, but that arrangement usually involves a reduced rate or fixed fee at the front end. In any case, the payer, not the court, negotiates the arrangement. Whether the lawyer accepts that arrangement is voluntary and contractual. No fee-paying client in the private market for legal services would allow a third party adjudicator unilaterally to award an enhanced fee after the fact.

Outcome enhancement criteria are no more easily discerned than are quality criteria. The only thing that is certain is that these metaphysical considerations would enable judicial capriciousness in ways that always would be unpredictable and, in many instances, unreviewable. If quality and outcome enhancements become available, no matter how they are defined, it would not be long until half or more of the fee awards in black lung and longshore cases included enhancements for exceptional quality work or exceptional results or both. This would be a convenient surrogate for an otherwise impermissible risk of loss enhancement.

3. For high volume insured benefits programs like black lung and longshore, a significant escalation

in shifted attorney's fees will have additional adverse, if not unintended consequences.

First, a key factor making workers compensation costs and benefits insurable and affordable is predictability. In black lung and longshore claims, benefits include a factor for a shifted fee. In black lung claims being litigated now, the policies were written, premiums were charged, or reserves were set aside many years ago, thus making any effect of a new fee-shifting formula retroactive and unfunded. Going forward it would impose a new cost of doing business on mining and maritime companies and their insurers that was not intended by Congress.

Second, new subjective enhancements will increase fee litigation inappropriately. A good argument can be made that no longshore or black lung case requires exceptional skill on the part of claimant's counsel and no result is so spectacular that it should warrant an enhancement. Benefits are, after all, statutory and limited. Nevertheless, history teaches that if legally permitted, enhancements for quality and outcome will be awarded with frequency and in an unpredictable way. Claimant's counsel will ask for these enhancements in every case and many judges will give them. Because the enhanced awards will seem unfair to the employer or insurer, they will be litigated and appealed. Because an unenhanced award will seem unfair to claimant's counsel, they too will be litigated and appealed. The recent efforts by black lung claimants' counsel to be compensated for the risk of losing or contingency enhancements and

the willingness of administrative law judges to award them proves the point.

Finally, while black lung claims cannot be settled, longshore claims frequently are settled. *See* 33 U.S.C. § 908. Settlements may include an attorney's fee. The prospect of a much larger fee award may encourage counsel to litigate a close case instead of settling.

The enhancement rules being considered by this Court, if adopted, would apply unpredictably. Amici believe that a pronouncement by this Court allowing enhancements for quality and outcome, however finely tuned a rule might be, will become the rule in most, if not every case in the black lung and longshore benefits programs, and it will not be applied following a thoughtful evaluation of rational standards.

The lodestar rule uncluttered by enhancements for any subjective, unknowable, or personal sentiments is the most fair, predictable and just rule for fee shifting and Amici respectfully ask the Court to preserve this good rule.

CONCLUSION

The decision of the Eleventh Circuit approving quality and outcome enhancements should be reversed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SONNY PERDUE, Governor of the State of Georgia, *et al.*,

Petitioners

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF SMALL PRIVATE LAW FIRMS THAT RELY ON STATUTOR FEE AWARDS IN PUBLIC INTEREST LITIGATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are small private firms that represent plaintiffs in public interest or private attorney general litigation.[1] *Amici* are located and engage in such litigation throughout the nation, within seven of the United States Courts of Appeals. They litigate plaintiffs' claims under civil rights, civil liberties, employment, labor, benefits, education, fair housing, disability, consumer protection and environmental law. The litigation is often complex. Frequently it involves systemic reform of public and private institutions. Such institutional reform litigation typically generates no substantial damages or common fund.

Each of these *amici* and the many other such firms around the nation, rely on statutory fees awarded under more than 100 federal statutes to finance their firms. The disincentives that already reduce such fees below full market compensation in such cases have forced some of them to reduce their commitment to meritorious public interest cases in favor of other kinds of litigation in which they receive full market-driven compensation.

Often these *amici* partner with not-for-profit legal organizations and/or large law firms to prosecute their public interest lawsuits. This is especially true of their systemic institutional reform cases.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Several of these *amici* represent other lawyers and law firms in making statutory fee claims.

The *amici* directly included here are:

Andrus Anderson, LLP, located in San Francisco, California (Ninth Circuit).

Bonnett, Fairbourn, Friedman & Balint, P.C., located in Phoenix, Arizona (Ninth Circuit).

Law Offices of Matthew W. Dietz, P.L., located in Miami, Florida (Eleventh Circuit).

Diller Law firm, located in Wilkes-Barre, Pennsylvania (Third Circuit).

David Ferleger, located in Jenkintown, Pennsylvania (Third Circuit).

David M. Fish, located in New York, New York (Second Circuit).

Fox & Robertson, P.C., located in Denver, CO (Tenth Circuit).

Hadsell, Stormer, Keeny, Richardson & Renick, LLP, located in Pasadena, California (Ninth Circuit).

Peter Henner, located in Clarksville, New York (Second Circuit).

Killmer, Lane & Newman, LLP, located in Denver, Colorado (Tenth Circuit).

Miller O'Brien Cummins, PLLP, located in Minneapolis, Minnesota (Eighth Circuit).

Outten & Golden, LLP, located in New York, New York (Second Circuit).

Law Offices of Richard M. Pearl, located in Berkeley, California (Ninth Circuit).

Law Office of Beth Pepper, located in Baltimore, Maryland (Fourth Circuit).

Rosen, Bien & Galvan, LLP, located in San Francisco, California (Ninth Circuit).

Rosenthal & Greene, PC, located in Portland, Oregon (Ninth Circuit).

Rudy, Exelrod, Zieff & Lowe, LLP, located in San Francisco, California (Ninth Circuit).

Schneider, Wallace, Cottrell, Brayton, Konecky, located in San Francisco, California (Ninth Circuit).

Law Offices of Amitai Schwartz, located in Emeryville, California (Ninth Circuit).

QUESTION PRESENTED

The Question Presented in this case is: Can an attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' *amici* argue that lodestar awards never should be upwardly enhanced, except that the United States would allow for such enhancement when a case is extremely undesirable. Our brief, therefore, addresses the appropriateness of providing for upward enhancements in those few cases where the trial judge who decided the case, exercising sound discretion, has determined that such enhancement is appropriate.

The legislative history of Section 1988 makes clear that Congress intended for the courts to apply a private market for legal services based approach to determining reasonable attorney's fees.

Applying this Court's precedents, the district courts already make fee awards to prevailing plaintiffs that generally do not include compensation for much work for which clients pay fees for services in the private market. Thus, absent the possibility of upward enhancement, attorneys for prevailing civil rights plaintiffs almost invariably would be paid a "lodestar minus," namely less than the attorneys would be paid for comparable work in the private market for legal services.

Upward enhancement of the lodestar for unusually high quality of representation and outstanding results is entirely consistent with the market billing practices for fee paying clients in similarly complex federal litigation. A *per se* prohibition on upward adjustment to the lodestar flies in the face of the statute and Congressional purpose in enacting Section 1988.

The current prevalence of settlements in institutional reform litigation demonstrates that the potential for upwardly enhanced fee awards, which are seldom requested and seldom awarded, has not and will not inhibit settlement of institutional reform cases.

This Court should continue its long history of allowing the district courts to exercise their sound discretion, reviewed by the Courts of Appeals, to award upward enhancements in the statutory fees cases that warrant them.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF SECTION 1988 MANDATES UPWARD ENHANCEMENTS OF STATUTORY FEE AWARDS

In enacting 42 U.S.C. § 1988 ("Section 1988"), Congress was concerned that "civil rights laws depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain." S. Rep. No. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910;

H.R. Rep. No. 1558 (1976). Congress recognized that to attract "competent counsel," attorney's fees awarded under Section 1988 must be governed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011 at 6. In other words, Congress was concerned that "[i]f federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers—who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation—and public interest lawyers, who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found." Stanley M. Grossman, Comment, *Statutory Fee Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 Ariz. L. Rev. 587, 592 (1997); *see also* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 309-310 (1990).

Congress explicitly identified the standards to be applied in determining a reasonable fee under Section 1988, endorsing the multi-factor market-based approach described in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and "correctly applied" in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). S. Rep. No. 94-1011 at 6; *see also* H. Rep. No. 94-1558, at 4 (citing *Johnson*).

In doing so, Congress "clearly defined the role that the marketplace should play in its fee-shifting scheme" by citing four cases where the judge "looked to the marketplace to establish a reasonable statutory fee and emphasized the need to place civil rights lawyers on a competitive footing with attorneys practicing in other complex but more traditional forms of practice." Brand, *The Second Front in the Fight for Civil Rights*, 69 Tex. L. Rev. at 314-315.

Moreover, in citing to *Johnson*, Congress indirectly adopted the factors described in the American Bar Association's ("ABA") 1969 Model Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106 (1969), which *Johnson* relied on for its multi-factor approach. *See Johnson*, 488 F.2d at 719. Disciplinary Rule 2-106 was incorporated in substantially the same form into the current Model Rules of Professional Conduct, Rule 1.5 and has been adopted by every state with the exception of California (which adopted a similar 11 factor test in California Rule of Professional Conduct 4-200(b)). *See* ABA Website (summarizing state adoption of ABA Model Rules of Professional Conduct), *available at* http://www.abanet.org/cpr/mrpc/model_rules.html. Both the twelve factor test in *Johnson*[2] and the ABA factors[3] include criteria

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[2] The twelve factors cited in *Johnson* are: (1) the time and labor required; (2) the novelty and the difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of

used in the private market to make upward enhancements to attorney's fees.

Section 1988 and other public interest fees shifting statutes thus look to the private market for legal services that are billed and paid currently in making fee awards. To that end, this Court, for example, has mandated that the billing rates to be awarded to counsel for prevailing parties must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). This Court also has directed that paralegal personnel's services are to be compensated on the basis of private market rates where consistent with the relevant market practice, not the cost based rates. *See Missouri v. Jenkins*, 491 U.S. 274, 286-88 (1989). And salaried attorneys working for non-profit organizations receive the same hourly rates they would receive if they were

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the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship; and (12) awards in similar cases. 488 F.2d at 717-19.

[3] The ABA Factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. ABA Model Rules of Professional Conduct, Rule 1.5(a).

working in private law firms. *See Blum*, 465 U.S. at 894-96.

As discussed below, absent the potential for upward enhancement, the lodestar amount inevitably leads to an award that reduces the amount of hours worked, *i.e.* "lodestar minus," that is inconsistent with market practice. Prohibiting upward enhancement of the already reduced lodestar undermines the purposes of pubic interest fee shifting statutes. Such a prohibition almost invariably will lead to below market fee awards as compared to fees paid in equally complex federal litigation. "A fee award smaller than the basic lodestar would not pay for 'all time reasonably expended,' and could not, by definition, be 'fully compensatory.'" Kyle R. Kravitz, Note, *Denying the Devil his Due: Contingency Fee Multipliers after City of Burlington v. Dague*, 38 Vill. L. Rev. 1661, 1685 (1993). The result is to put civil rights and other public interest or private attorney general plaintiffs at a competitive disadvantage in seeking counsel, a result that Congress forswore.

II. LODESTAR AWARDS GENERALLY ARE BASED ON GREATER REDUCTIONS OF ACTUAL TIME INCURRED THAN THOSE MADE BY PRIVATE ATTORNEYS WHO BILL THEIR CLIENTS FEES FOR SERVICES

This Court has mandated that the starting point for determining a reasonable fee is the lodestar, which is the product of the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In practice, however, the

lodestar calculation has evolved to "emphasize[] reduction of the initial fee request in reasonableness analysis," while limiting "the lower courts' discretion to find pro-plaintiff, upward adjustments." Layne Rouse, Note, *Battling for Attorneys' Fees: The Subtle Influence of "Conservatism" in 42 U.S.C. § 1988*, 59 Baylor L. Rev. 973, 990-992 (2007). As a result, the process for determining a reasonable fee almost invariably includes a reduction of the time actually incurred. Without any potential upward enhancement, the resulting "lodestar minus" undermines Congress' purpose in enacting Section 1988.

In presenting a fee request under Section 1988, and comparable public interest statutes, the fee applicant must exercise appropriate billing judgments to exclude time that is excessive or unnecessary. *Hensley*, 461 U.S. at 434 (applicant must "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission"). This is precisely the type of billing judgment any competent private attorney exercises in presenting a bill to a private fees for services client. *See* WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 90 (Carolina Academic Press 1996); *see also* JOHN W. TOOTHMAN & WILLIAM G. ROSS, LEGAL FEES: LAW AND MANAGEMENT 43-44 (Carolina Academic Press 2003); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 Brandeis L.J. 199, 232-233 (2007); Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-*

Imperative Model, 104 Yale L.J. 1907, 1915 (1995); Kevin Hopkins, *Law Firms, Technology, and The Double-Billing Dilemma*, 12 Geo. J. Legal Ethics 95, 98 (1988).

Indeed, "[b]illing partners have an ethical duty to discount wasted or unnecessary time by associates." ROSS, THE HONEST HOUR at 90. Such billing judgment typically is accomplished through the billing attorney's discrete reductions of time reflected on his or her pre-bill, as well as across-the-board percentage reductions to account for unnecessary time that is not specifically identified. *See, e.g.*, *Hensley*, 461 U.S. at 434 ("In the private sector 'billing judgment' is an important factor in fee setting.") (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (1980) (*en banc*)); TOOTHMAN AND ROSS, LEGAL FEES at 43-44 (Billing judgment "is most often accomplished by writing down the bill either line by line, which allows the client to understand the rationale for the write down and to confirm that the rationale was consistently applied, or as a lump sum at the foot of the bill.").

Following counsel's voluntary billing judgment reductions, the opposing party and the district court carefully scrutinize the fee application. To the extent that the attorney presenting a statutory fees claim to a district court fails adequately to reduce the requested fee, the district court will further reduce the lodestar. *See Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("[T]he district court must carefully scrutinize the total number of hours reported to arrive at the number of hours that can reasonably be charged to the losing party, much as a senior partner

in a private firm would review the reports of subordinate attorneys when billing clients whose fee arrangement requires a detailed report of hours expended and work done."); Alan Hirsch and Diane Sheehey, Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation*, 26-27 (2005) ("[L]ower courts have reduced fee awards where there has been duplication of services; failure to pursue settlement prior to filing a straightforward suit; excessive total time billed considering the lack of difficulty of the case; excessive time billed for particular tasks; use of too many attorneys or too much conferencing; unnecessary work by a trial consultant deemed a 'non-lawyer' ...; publicity work; reading or reviewing of books not closely related to the case; performance of secretarial or clerical tasks by lawyers; and other assorted work deemed unnecessary.") (internal citations omitted); *see also O'Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997) (affirming reduction of time "spent in excess of that reasonably required of a task, hours spent researching inapplicable areas of law, and hours inadequately explained or detailed"); *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995) (affirming reduction in hourly rate based on the relevant market and reduction to time based on excessive and unnecessary work); *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992) (upholding reduction for lack of difficulty/complexity); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984) (lack of "detailed contemporaneous time records" supports "a substantial reduction of any award or, in egregious cases, disallowance").

Largely in contrast to the private market for service to fee paying clients, the federal statutory fee applicant also must exclude time spent on unsuccessful claims that do not share a common core of facts and law with the claims on which plaintiff has prevailed, or partially succeeded. *See Hensley*, 461 U.S. at 430-35. As a result, statutory fee applications often include significant voluntary reductions, both discrete and across-the-board, to the actual reasonable time incurred, exceeding the scope of billing judgment reductions exercised in presenting bills to fee paying clients. *See, e.g., Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1055-56 (2d Cir. 1989) (25% voluntary reduction to a fee request to account for unrelated claims); *Popham v. Kennesaw*, 820 F.2d 1570, 1582 n.4 (11th Cir. 1987) (noting fee applicant's voluntary reduction for excessive time and limited success); *Case by Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1247 (10th Cir. 1998) (noting fee applicant had voluntarily reduced fee request by 5% to account for media related activities and an unsuccessful claim).

Moreover, except where the fee shifting statute specifically overrides 28 U.S.C. §§ 1821 and 1920, expert witness fees are not awarded as costs. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991). "[E]xpert witness fees [often] form a large component of the total cost of litigation in the civil rights context." Maria-Elena Cigarroa, *The Recoverability of Expert Witness Fees in Civil Rights Cases: The Post-*Crawford *Crisis*, 10 Rev. Litig. 185, 190 n.24 (1990) (collecting cases where expert witness fees constituted up to 47% of the attorney's fees, expenses, and costs). By *amici's* personal experience,

these unrecoverable expenses can amount to hundreds of thousands of dollars.

Defendants also have numerous tools to reduce plaintiffs' fees. *See City of Burlington v. Dague*, 505 U.S. 557 (1992) (no contingent risk multipliers); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (defendants can insist on fee waivers, including in non-damages cases); *Marek v. Chesney*, 473 U.S. 1 (1985) (Rule 68 offers, including lump sum monetary offers, can preclude fee claims); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 605 (2001) (attorney's fees may not be awarded for lawsuit that is "catalyst" prompting voluntary change in defendant's conduct; to recover attorney's fees there must be an "alteration in the legal relationships of the parties").

In addition to making discrete reductions, the district court is also permitted to exercise its discretion to reduce the fee award using across-the-board percentage reductions to the number of hours or final lodestar, particularly where it is faced with a voluminous fee request. *See e.g.*, *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008) (*per curiam*); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008); *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *Daggett v. Kimmelman*, 811 F.2d 793, 797-98 (3d Cir. 1987); *Tomazzoli v. Sheedy*, 804 F.2d 93, 97-98 (7th Cir. 1986).

At the end of the day, the district court is armed with considerable, virtually unreviewable discretion to reduce the lodestar to be awarded. *Hensley*, 461 U.S. at 437 (deference is "appropriate

in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters").

In the instant case, for example, plaintiffs' counsel exercised billing judgment reduction before submitting their fee application. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1273 (N.D. Ga. 2006). Based on its independent and careful review the district court then made an across-the-board fifteen percent reduction to the total number of non-travel related hours included in the initial lodestar to account for "vague and noncompensable" time entries, overstaffing, and excessive time spent on various pleadings, trial preparation, and witness reports. *Id. at* 1286-88. This reduction was affirmed by denial of Plaintiffs' cross appeal. *See Kenny A. v. Perdue*, 532 F.3d 1209, 1219 (11th Cir. 2008).

In total, the district court's across-the-board reduction to Plaintiffs' fee application reduced the lodestar amount from $7,171,434.30 to $6,012,802.90, a reduction of $1,158,631.40. *Kenny A.*, 454 F. Supp. 2d at 1270, 1286. Such reductions are common in Section 1988 and other public interest cases. *See e.g., Hensley*, 461 U.S. at 438 n.13 (30% reduction to attorney's time); *Green v. Torres*, 361 F.3d 96, 97 (2d Cir. 2004) (*per curiam*) (affirming 20% across-the-board reduction for lack of success); *Harris v. Marhoefer*, 24 F.3d 16, 18-19 (9th Cir. 1994) (upholding 50% reduction for lack of success); *Jensen v. Clarke*, 94 F.3d 1191, 1203-04 (8th Cir. 1996) (affirming 10% reduction for lack of documentation and 15% for lack of success); *Foley v.*

City of Lowell, 948 F.2d 10, 18, 20 (1st Cir. 1991) (approving of 1/3 across-the-board reduction); *Spell v. McDaniel*, 824 F.2d 1380, 1403 n.17 (4th Cir. 1987) (approving of lodestar calculation that included 5% across-the-board reduction).

III. UPWARD ENHANCEMENT IN APPROPRIATE CASES IS FULLY CONSISTENT WITH THE PRACTICES AND REALITIES OF THE PRIVATE MARKET FOR LEGAL SERVICES IN SIMILARLY COMPLEX FEDERAL LITIGATION

A. The Private Market Pays Enhanced Fees in the Form of "Premium Billing"

Given the purposes of Section 1988 and similar statutes, precluding upward enhancement of lodestars is logically inconsistent with the decisions that mandate reduction of the lodestar beyond customary billing judgment reductions. As noted, in the private market, fees generally are not reduced for partial success, for work on lost claims, or by the cost of the clients' expert witnesses. In addition, for example, attorneys and their clients in the private legal market sometimes enter into fee arrangements that provide for payment of an hourly rate with a bonus for a successful result. *See, e.g.*, Dianne K. Dailey, et al., *Alternative Billing Systems: Abandoning Time as a Measure of Value*, 27 The Brief 44 (1998) (describing "premium billing" used in "complex cases": "When a good result is obtained for a client, the firm adds a surcharge to the amount initially determined by the firm's hourly rate."). This and similar practices are engaged in by many law firms that are included in the *American Lawyer* and

*National Law Journal*s lists of the largest firms in the nation.

Firms like those on the *American Lawyer* and *National Law Journal* lists of largest firms are major players in defining the billing practices within the markets for legal services in which they practice throughout the nation. Notably, law firms like these frequently partner with smaller firms such as *amici* and not-for-profit organizations to bring large institutional reform cases. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1, 127-28 (2004) (noting institutional reform cases from across the country in which large law firms have partnered with public interest oriented legal organizations). The premium billing approach already embedded in the market should apply in Section 1988 fee matters equally to law firms large and small, for profit and not-for-profit. *See Blum*, 465 U.S. at 894-96.

Up to now this Court has tracked the practice of allowing such enhancements in some subset of cases in its statutory fees decisions. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (Upward adjustments to the lodestar are permissible in "certain 'rare' and 'exceptional' cases."); *Blum*, 465 U.S. at 897 ("[A]n enhanced award may be justified 'in some cases of exceptional success,' ... and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high."); *Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee ...

and indeed in some cases of exceptional success an enhanced award may be justified."). There is no reason to preclude upward enhancement factors that pertain in the private market now.

B. Upward Enhancements are Awarded in Many Other Types of Fee-Shifting Cases To Which Congress Sought Parity for Section 1988 Cases

As noted, Congress intended that attorney's fees awarded under Section 1988 should "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011 at 6. Examination of market practices in federal litigation, including ERISA, securities, and antitrust cases similar in complexity to Section 1988 cases demonstrates that restricting district courts to the "lodestar minus" calculation fails to create parity for fee awards in Section 1988 civil rights and other public interest cases that do not yield large damage awards or common funds.

In these kinds of similarly complex cases where a common fund is recovered, most courts allow, and some require, that a percentage of the common fund be awarded as attorney's fees. *See, e.g., Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1271 (D.C. Cir. 1993) (requiring percentage approach); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (requiring percentage approach); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991) (permitting the percentage approach). In these common fund cases, the district

court uses its familiarity with the case to determine a reasonable percentage of the common fund to award as attorney's fees. The percentage awarded varies widely, but generally ranges between twenty-five and thirty percent of the fund. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (2004).

Some Circuits have "encourage[d] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted). These "cross checks" demonstrate how an exclusively "lodestar minus" calculation undermines Congress's goal of ensuring that civil rights attorneys are compensated under the same standards as attorneys in other complex federal litigation. For example, the lodestar cross-check uniformly allows for a multiplier. Courts have routinely recognized that where a lodestar analysis is employed to calculate attorney's fees or is used to "cross check" a percentage of recovery calculation, counsel may be entitled to a multiplier to the lodestar calculation. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122 (2004) ("The lodestar is ... useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases."); 4 NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2009) ("multiples ranging from one to four are frequently

awarded in common fund cases when the lodestar method is applied.").

In order to be comparable to private market fees for similarly complex litigation, federal statutory fee awards must include a potential for enhancement in extraordinary circumstances. And such enhancements must be permitted on more bases than the simple undesirability of the case at hand. *Contra* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30-31 (allowing that "enhancements may be necessary where ... the client or case is so unpopular or otherwise controversial that the attorney suffers professional or financial damage from the representation.").

In particular, enhancement of attorney's fees awards under section 1988 and similar statutes should not turn solely on whether sufficient damages or common funds are awarded to the plaintiffs. The value to society, for example, of institutional or systemic reform cases that do not generate damages or common funds surely is as great as those that do. *See* S. Rep. No. 94-1011, at 6 (fees awarded under Section 1988 should be comparable to antitrust cases and should "not be reduced because the rights involved may be nonpecuniary in nature."); Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the Rufo Standard Be Applied to Antitrust and Commercial Consent Decrees?*, 90 NW. U.L. Rev. 1781, 1829 (1996) ("Our society places greater value and importance in fundamental rights, which are usually implicated in institutional reform decrees, than the pecuniary

interests involved in antitrust and commercial decrees.").

IV. UPWARD ENHANCEMENTS, WHICH ARE RARELY SOUGHT OR AWARDED, CREATE NO BARRIER TO SETTLEMENT OF INSTITUTIONAL REFORM LITIGATION

A. Upward Enhancements are Rarely Sought and Rarely Awarded

Without citation, *amici* for Petitioners argue that continuing to allow for the possibility of enhancement under any basis will lead to extensive and burdensome fees litigation. *See* Brief for Ass'n County Comm'rs of Georgia as *Amicus Curiae* in Support of Petitioners at 16-18; Brief of Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 16-18.[4]

Petitioners' *amici* conveniently overlook the fact that many states permit upward enhancements of public interest attorney's fees, often based on more criteria than presently permitted under federal law.

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[4] The only citation in support of this proposition is located in the Washington Legal Foundation's brief. *See* Brief for Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners at 16-17 n.6. That citation refers to the declarations in support of Respondents' motion for attorneys' fees filed in the district court, and asserts that the Ralph Knowles declaration suggests that the "lower federal courts have routinely been granting lodestar enhancements to plaintiffs who successfully challenge the adequacy of government-run foster care systems." *Id.* However, Mr. Knowles' declaration discusses only multipliers awarded to "[s]uccessful class counsel in securities, antitrust, products liability, toxic torts, and consumer law class or mass actions brought under Rule 23." Jt. Append. at 66-67.

See Michael Kao, Comment, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. Rev. 825, 834-35 (2004). District courts perforce apply these criteria in awarding fees under such state statutes. *See id.*; *see also* Section III.B, *supra* (enhancement decisions made in common fund cases).

The argument for a *per se* prohibition of upward enhancement ignores two additional important facts. First, for more than 30 years, prevailing plaintiffs have been permitted to seek enhancements to the lodestar amount in exceptional cases. *See Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565 ("upward adjustments of the lodestar figure are still permissible"); *Blum*, 465 U.S. at 899 (quality of representation "may justify an upward adjustment"); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996) (rejecting argument that multiplier could never be applied after *Dague* and affirming a multiplier based on "the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam") (quoting district court). Even the United States agrees that a multiplier is appropriate in cases of an undesirable or unpopular client. Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30.

Second, enhancements rarely are sought or granted. One study found that only one out of sixteen prevailing plaintiffs in civil rights cases terminated in federal court in California during 2000 and 2001 sought a multiplier. Kao, *Calculating Lawyers'*

Fees, 51 UCLA L. Rev. at 840 n.119. The court in the one case in which a multiplier was requested declined to grant one. *Id.* at 840. Even in California, which allows for multipliers on more bases (including contingent risk) than under federal law, only four out of thirteen prevailing plaintiffs in civil rights cases sought a multiplier during the same period. *Id.* at 840 n.119. The California courts awarded a multiplier in only two of those cases. *Id.* at 840.

B. The Minimal Risk of Enhanced Attorney's Fee Awards does not Threaten the Potential for Settlement of Institutional Reform Litigation

Petitioner and Petitioners' *amici* without evidence assert that allowing for enhancement of fees will "discourage broad-based settlements" of disputed claims. Defendants-Petitioner's Brief on the Merits, June 22, 2009, at 14, 47-51; *see* Brief for National School Board Assoc. as *Amicus Curiae* in Support of Petitioner at 8-12; Brief of Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 14-16; Brief for National Governors Assoc., *et. al.* as *Amici Curiae* at 3-7. This argument underestimates the many incentives to settlement of institutional reform cases.

While comprehensive statistics on consent decrees in institutional reform cases are not available, "commentators across the political spectrum agree that institutional reform consent decrees are prevalent." Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform in Consent Decrees, in* CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES, 14 (Andrew Rachlin ed., 2006) [hereinafter *Politics of*

Consent], *available at* http://www.princeton.edu/prior/publicatons/docs/consent.pdf. For example, in 2003, consent decrees were in place in "prisons in 41 states and local jails in 50 states." *Id.* at 15 (citing ROSS SANDLER AND DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT, 4 (Yale Univ. Press 2003)). And a study in 2000 found that more than 600 school districts were under consent decrees. *Politics of Consent* at 15. Further, as of 2008, the U.S. Department of Justice's Civil Rights Division was monitoring "the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 101 facilities." U.S. Department of Justice, ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONAL PERSONS ACT FISCAL YEAR 2008, at 2-3 (2009), *available at* http://www.usdoj.gov/crt/split/documents/split_cripa08.pdf.

Incentives for settlement of institutional reform cases are complex and numerous. *See Politics of Consent*; *see also Pierce v. Underwood*, 487 U.S. 552, 568 (1988) (noting that other factors such as a change in administration could lead to settlement); Brief for Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 14 (acknowledging that settlement can be a win-win situation). In *Politics of Consent*, at least nine 9 factors[5] were identified, which inter-

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[5] These factors include: (1) institutional defendants' desire to "overcom[e] problems and correct[] mistakes;" (2) efficiency (savings in time and money); (3) the lack of a judicial determination of liability; (4) flexibility of consent decrees in fashioning a remedy; (5) "blame avoidance" and "credit claiming;" (6) protection from political reaction; (7) an excuse for

act to incent Defendants to settle institutional reform cases. *Politics of Consent* at 23-29. Of the factors identified, only one, efficiency, is directly implicated by the amount of attorney's fees awarded to prevailing plaintiffs. *Id.* at 24 (Settlement in institutional reform litigation saves "time and money" for both plaintiffs and defendants in institutional reform cases, "[d]evoting resources to fighting institutional reform litigation in cases where there is some risk of losing, is hard to defend.").

In the instant case the "State Defendants vigorously fought plaintiffs' claims for almost three years, filing both motions to dismiss and for summary judgment, as well as seeking repeatedly to limit plaintiffs' discovery efforts" before entering into a consent agreement. *Kenny A.*, 454 F. Supp. 2d at 1266. Petitioners' strategy "undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.* If the defendants had been concerned about the risk of a large fee award, why did they string out the litigation? Surely it would have been cheaper in every way had they made a reasonable settlement at an earlier stage of the litigation.

Moreover, plaintiffs' Section 1988 attorney's fees generally comprise only a small fraction of the cost of the reform provided for by the consent decree. For example, in the instant case, the benefit conferred to the Plaintiff class was estimated to be

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inaction; and (8) collusion and buck-passing; and (9) leveraging resources to support institutions outside the normal political process. *Politics of Consent* at 23-29.

$168 million.[6] *See* Plaintiffs' Brief in Support of Award of Attorneys' Fees and Expenses of Litigation, D. Ct. Docket No. 495 at 4. The total fee awarded, including the enhancement, represents approximately six percent of the value of the benefit conferred to the class. The enhancement is worth less than three percent of the value conferred. Since enhancements in institutional reform cases are rarely sought and rarely awarded, it is difficult to imagine that the remote possibility of enhancement, which represents such a small fraction of the overall cost of resolving the case, would prevent settlement.

C. The District Courts' Exercise of Sound Discretion and Appellate Courts' Review More than Adequately Protect Against Undue Upward Enhancements

Any fear of undue upward enhancements is alleviated by the requirement that the district courts provide a "concise but clear explanation for its reasons for the fee award," which similarly protects against unwarranted downward adjustments. *Hensley*, 461 U.S. at 437. The appellate courts, armed with the clear and concise explanation, are then able to review each award to ensure it applies appropriate criteria in the context of the case. *See, e.g., Robinson v. Equifax Info. Servs., LLC*, 560 F.3d

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[6] Without providing an alternative calculation, in the district court, Petitioner disputed Respondent's valuation of the benefit achieved on behalf of the plaintiff class. State Defendants' Brief in Opposition to Plaintiffs' Application for Award of Attorneys' Fees and Expenses of Litigation, D. Ct. Docket No. 510 at 11-12. However, even if Respondent's valuation is cut in half, the enhancement awarded represents only 5% of the undoubtedly underestimated value of the benefit.

235, 243 (4th Cir. 2009) ("[B]ecause a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong.") (internal citation omitted).

District courts around the country regularly deny upward enhancement of lodestars and the Courts of Appeals regularly affirm these denials. *See e.g.*, *Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 225 (3d Cir. 2009) (affirming denial of request for multiplier based on result under 42 U.S.C. § 2000e); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 621-22 (6th Cir. 2007) (affirming denial of enhancement for exceptional success under False Claims Act, 31 U.S.C. § 3730(d)); *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 803 (5th Cir. 2006) (affirming denial of multiplier based on novelty, skill, preclusion of alternative employment, and undesirability under Fair Labor Standards Act, 29 U.S.C. § 216(b)); *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994) (refusing to remand for reconsideration of enhancement for success).

Having overseen the litigation, the district court enjoys a "superior understanding of the litigation." *Hensley*, 461 U.S. at 437. In short, it is "intimately familiar with the parties, the attorneys, and the complete course of the litigation." *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1207 (10th Cir. 2008); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 246 (3d Cir. 2007) ("District Judge presided over this massive case for over 4 years and was intimately familiar with its complexity, the lawyers involved, and the amount of work required

to prosecute it."). In addition, each district court possesses superior familiarity with the actual practices in the private market in its forum, in which civil rights plaintiffs will be competing for competent counsel. This includes, at the most basic level, familiarity with the prevailing hourly rates on which the lodestar is based. *See Blum*, 465 U.S. at 895 n.11 (district court must assess the applicant's evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation"). In short, the district court's "superior understanding" positions it to assess equally whether downward or upward enhancement is appropriate.

Here the district court's familiarity with the case and local market practices caused it to reduce the claimed lodestar by fifteen percent. *Kenny A.*, 454 F. Supp. 2d at 1286-88. At the same time, its familiarity with the case and its forum caused it to find that a 1.75 multiplier should be awarded because:

> [P]laintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed in any other case during its 27 years on the bench.
>
> . . .
>
> [E]ven if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as

> 'intricately detailed and comprehensive' as that contained in the Consent Decree.

Kenny A., 454 F. Supp. 2d at 1289-90.

In other words, the district court rendered a concise but clear opinion, which then received appropriate appellate review by the Court of Appeals.[7] It follows that in this case, the Court should allow consideration of the superior performance and results factors in upward enhancement of the lodestar.

CONCLUSION

Under Section 1988 and similar public interest federal statutes, attorney's fees awards are governed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and [must] not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011 at 6. A strict lodestar calculation essentially allowing only for reductions to the number of hours or rate claimed does not properly apply this standard, nor does it correctly reflect the practices in the private market for legal

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[7] Courts of Appeals, including the Eleventh Circuit, are not loath to vacate upward enhancements when it determines that a district court misapplied legal criteria. *See e.g.*, *Gray v. Bostic*, 570 F.3d 1321 (11th Cir. 2009) (remanding fee award that included an enhanced lodestar amount for delay in payment of fees); *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991) (reversing district court award of 25% enhancement for, *inter alia*, exceptional results and performance).

services in comparable matters as Congress intended. Moreover, the largely remote possibility of enhancements and the rare instances in which they are granted (resting in the sound discretion of the district court subject to appropriate review by the Courts of Appeals) do not inhibit settlement of large institutional reform cases. The public interest in encouraging competent attorneys to take on civil rights suits is too great to further disincentivize representation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,
Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a reasonable attorney fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and/or results obtained, or are these factors already included in the lodestar calculation?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] It regularly appears in this and other federal courts in cases involving the reasonableness of attorney fee awards. *See, e.g., Gisbrecht v. Barnhart*, 535 U.S. 789 (2002); *Farrar v. Hobby*, 506 U.S. 103 (1992); *City of Burlington v. Dague*, 505 U.S. 557 (1992).

The Court has determined that there is a strong presumption that the lodestar figure, without any adjustment, is the reasonable attorney fee to be awarded to prevailing plaintiffs under federal fee-shifting statutes. Although in none of its past decisions has the Court upheld an upward adjustment from the lodestar figure, it nonetheless has left the door slightly open to the possibility that an enhancement might be warranted in some exceptional case. WLF is concerned that by leaving open that possibility, the Court has spawned frequent and costly satellite litigation over the propriety of an upward adjustment. WLF believes that those costs are not worth the candle – the goals Congress sought to achieve in adopting fee-shifting statutes can be fully accommodated within the framework of the lodestar method, at much less cost.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

The Question Presented addresses whether the fee award may ever be enhanced above the lodestar figure based solely on quality of performance and/or results obtained. While WLF believes that that question should be answered "no," it is concerned that a decision limited solely to one type of enhancement would keep the door ajar and thus would not eliminate costly satellite litigation over enhancement multipliers. WLF respectfully submits that the Court should more broadly address whether enhancements above the lodestar figure should *ever* be permitted, for any reason.

STATEMENT OF THE CASE

Respondents are foster children in the custody of the Georgia Department of Human Resources. They filed suit in 2002 against various Georgia government agencies and officials, alleging that the defendants were responsible for deficiencies in the foster care systems in Fulton and DeKalb Counties and that those deficiencies violated their rights under federal and state law and the U.S. Constitution. The district court certified the named plaintiffs as representatives of a class consisting of all foster children in those two counties.

Respondents and Petitioners settled all claims in October 2005, other than the amount of attorney fees to which Respondents were entitled under 42 U.S.C. § 1988.[2] Respondents separately settled in May 2006 with two other defendants, Fulton County and DeKalb

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[2] Among the Petitioners is Georgia Governor Sonny Perdue; Petitioners are hereinafter referred to collectively as "Perdue."

County. Respondents received an agreed-upon attorney fee award as part of that second settlement, and the size of that award is not the subject of this appeal.

The district court entered a consent judgment in favor of the plaintiff class, memorializing the terms of the October 2005 settlement. After Perdue and Respondents could not reach an agreement on the amount of fees and expenses to be awarded to Respondents in connection with the consent judgment, Respondents filed a motion for an award. In October 2006, the district court granted the motion in substantial part. Pet. App. 94-172. In computing a lodestar fee, the court accepted Respondents' requested hourly rates for each of the attorneys and paralegals who worked on the case, but it determined that the number of hours of work for which Respondents sought reimbursement was unreasonably high and, in some cases, insufficiently documented. Reducing the number of hours reasonably worked by 15% from the number of non-travel hours requested,[3] the court determined that the lodestar amount was $6.01 million.

The district court then determined that Respondents were entitled to a 75% percent enhancement of the lodestar amount, Pet. App. 154, based primarily on the "superb quality" of the work performed by counsel for Respondents and the "truly exceptional" success they achieved for their clients. *Id.* at 151, 152. The court also cited three contingency-

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[3] The reduction in non-travel hours was 4,371 hours, and the reduction in travel hours was 384 hours – a 50% reduction in the latter category.

related factors as supportive of the 75% enhancement.[4] The court also credited the declaration of Atlanta attorney Ralph Knowles, who stated that "successful class counsel in similar cases have received multiples of 1.5-5 times the lodestar." *Id.* at 155. Multiplying the lodestar amount by 1.75, the district court awarded fees totaling $10.52 million.

The Eleventh Circuit affirmed. *Id.* at 1-93. Although the panel unanimously agreed that the 75% enhancement should be upheld, no rationale for doing so commanded majority support. Judge Wilson determined that quality of representation and exceptional results can, in rare circumstances, justify enhancement of the lodestar amount, and that the district court did not abuse its discretion in granting a 75% enhancement in this case. *Id.* at 71-93. Judge Carnes determined that

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[4] Those three factors were: (1) class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement; (2) class counsel were not paid on an on-going basis as the work was being performed; and (3) class counsel's ability to recover a fee and out-of-pocket expenses was "completely contingent on the outcome of the case." *Id.* at 151. The third factor is self-evidently contingency-related, and the first two must also be understood as contingency-related to the extent that the district court was citing them as the basis for enhancing the lodestar amount (rather than as a basis for increasing the hourly rates for Respondents' counsel in order to compensate for the delay in payment, or as a basis for awarding interest on expenses incurred). After citing those three factors, the court conceded that "a lodestar enhancement cannot be based on contingency alone" (citing *Dague*), but it concluded that the three factors constituted something more than mere risk of nonpayment, and thus could properly be relied on, along with other listed factors, as the basis for the court's 75% enhancement above the lodestar amount.

the logic of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ["*Delaware Valley I*"], 478 U.S. 546 (1986), and *Dague* effectively precluded any enhancement above the lodestar amount based on the quality of performance and/or the results obtained. *Id.* at 17-57. He voted to affirm the 75% enhancement solely because he felt bound to do so by controlling circuit precedent that post-dated *Delaware Valley I*. *Id.* at 57-70. Judge Hill simply concurred in the judgment, declining to take sides in the disagreement between the other judges regarding the proper basis for affirmance. *Id.* at 93a.

The Eleventh Circuit subsequently voted 8-3 to deny rehearing *en banc*. Judge Tjoflat wrote an opinion dissenting from the denial. He stated that the district court had adopted the lodestar enhancement in a procedurally deficient manner, and he opined that enhancement based on exceptional results is never permissible in a case in which the plaintiffs primarily seeks sweeping equitable relief. *Id.* at 173-202. Judge Carnes (joined by Judge Tjoflat and Judge Dubina) also dissented, restating his belief (previously set forth in Part VI of his concurring opinion) that the lodestar amount should never be enhanced based on superb performance or exceptional results. *Id.* at 202-216.

SUMMARY OF ARGUMENT

When Congress has added fee-shifting provisions to federal statutes, it has done so to ensure that individuals possessing substantial claims under those statutes can attract competent counsel to represent them in court, even when they lack funds to pay up-

front fees. Accordingly, when a fee-shifting provision provides for an award of "reasonable" attorney fees to a prevailing party, the Court has understood the reasonableness of a fee to be solely a function of the amount necessary to attract competent counsel.

Over the past three decades, the Court has settled upon the "lodestar" as the appropriate method for determining what constitutes a "reasonable" fee award under a federal fee-shifting statute. The lodestar amount is defined as the number of hours reasonably expended on a case multiplied by an reasonable hourly rate for those professionals who worked on the case. The Court has established a strong presumption that the lodestar represents the reasonable fee. While it has stated occasionally that there may exist exceptional cases in which an award in excess of the lodestar amount would be required in order to render the award "reasonable," the Court has never upheld such an enhanced award.

Despite the strong presumption against enhancements, the courts below held that a 75% enhancement was appropriate in this case because, the district court found, counsel for Respondents performed work of "superb quality" and achieved "truly exceptional" success for their clients. WLF submits that an enhancement above the lodestar amount based on the quality of work performed and the level of success achieved is never appropriate, because those factors are not logically related to a plaintiffs' ability to attract competent counsel. In the opinion of the district court, Respondents were extremely fortunate to have attracted counsel capable of performing work (and who did

perform) at a level far superior to what they could have expected from reasonably competent attorneys with similar levels of experience. But Respondents' good fortune bears no logical relationship to what should be the focus of the "reasonable" fee inquiry: what fee was necessary for Respondents to attract competent counsel and is necessary to ensure that similarly situated claimants will be able to attract counsel to press their claims. To the extent that this case required counsel for Respondents to undertake a herculean effort and to employ their special skills in order to achieve the "superb results," that effort and skill are reflected in the $6.01 million lodestar amount – both in the approval of 25,000 hours of billable time and in the approval of hourly rates of up to $495 per hour.

Judge Carnes aptly observed that this Court's fee-award decisions have been moving steadily in the direction of a flat prohibition on enhancements above the lodestar amount. While earlier cases stated that enhancements might be appropriate in "exceptional" cases, both *Delaware Valley I* and *Dague* strongly questioned the appropriateness of enhancements. But because the Court has not completely shut the door on the possibility of enhancements, the unsurprising result is that a high percentage of all fee requests under federal fee-shifting statutes include a request for an enhancement above the lodestar amount. The result is a highly inefficient system in which significant resources are being expended by attorneys and courts in debating whether the circumstances of an individual case are sufficiently exceptional to warrant an upward adjustment. WLF submits that this expensive search for truly extraordinary cases is not warranted. Use of the

lodestar method is sufficient for determining a "reasonable" attorney fee in all, or virtually all, cases. Opening up the process to possible upward adjustment not only leads to needless expense but also, due to the absence of objective criteria for determining just when a case is extraordinary, is likely to lead to arbitrary, non-uniform application of the law.

Perdue has convincingly demonstrated why upward adjustments are never warranted based either on the quality of counsel's performance or on the results achieved. But eliminating those rationales for lodestar enhancements is unlikely to reduce the large volume of enhancement requests so long as the Court leaves open the possibility of other rationales. WLF notes, for example, that the district court based its 75% enhancement in part on contingency-related factors that the court deemed not to have been foreclosed by *Dague*. Accordingly, WLF submits that the Court should state categorically that calculation of a "reasonable" fee should focus solely on the lodestar calculation and that no upward adjustments from the lodestar amount should be permitted. There is no convincing evidence that the lodestar methodology is incapable of computing a "reasonable" fee in any discernable class of cases. In particular, the evidence does not support a claim that enhancements are necessary to ensure that "unpopular" litigants are able to attract competent counsel.

ARGUMENT

I. IN MANDATING "REASONABLE" FEES, CONGRESS SOUGHT FEES SUFFICIENT TO ATTRACT COMPETENT COUNSEL

Respondents seek an award under 42 U.S.C. § 1988(b), which permits an award of "reasonable" attorney fees to a prevailing party in a variety of civil rights actions – including (as here) an action to enforce federal constitutional rights under 42 U.S.C. § 1983.[5] In attempting to discern what constitutes a "reasonable" fee award, the Court repeatedly has looked to the intent of Congress in adopting § 1988(b) and other fee-shifting provisions.

Congress's purpose in adopting fee-shifting provisions has been "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Delaware Valley I*, 478 U.S. at 565. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 94-

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[5] The language of § 1988(b) is fairly typical of federal fee-shifting provisions. It provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The appendix to Judge Carnes's opinion dissenting from the denial of rehearing *en banc* provides a list of nearly 100 federal statutes that include a provision permitting the award of "reasonable" attorney fees to the prevailing party. Pet. App. 217-223. The Court has determined that Congress intended that a single standard for determining "reasonable" fees should apply to all such statutes. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

1558, at 1 (1976)). In other words, Congress's focus has been on fairness to litigants, not fairness to their counsel or a concern over the financial well-being of the legal profession. A fee award should "result[ ] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893-94 (1986) (quoting S. Rep. No. 94-1011, at 6 (1976)).

Over the past three decades, the Court has settled upon the "lodestar" as the appropriate method for determining what constitutes a "reasonable" fee award under a federal fee-shifting statute. *Dague*, 505 U.S. at 562. The lodestar amount is defined as the number of hours reasonably expended on a case multiplied by a reasonable hourly rate for those professionals who worked on the case. *Delaware Valley I*, 478 U.S. at 565. By the mid-1980s, the Court had "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." *Dague*, 505 U.S. at 562 (quoting *Delaware Valley I* at 565).

The "lodestar" method was not developed, however, until some time after the courts were required to begin establishing guidelines for determining the size of a "reasonable" fee. The delayed arrival of the lodestar method is hardly surprising when one considers that the concept of attorneys preparing bills based on hours worked is relatively new. As the Court recently explained, attorneys did not even begin keeping careful track of the hours spent on individual client matters until the 1940s (and even then it was only as a means to "allow attorneys and firms to determine whether fees charged were sufficient to cover overhead and generate

suitable profits"), and the practice of billing clients based on the number of hours worked did not become "widespread" until the early 1970s. *Gisbrecht v. Barnhart*, 535 U.S. 789, 800-801 (2002). Thus, before the early 1970s, courts seeking to determine a "reasonable" fee award could not easily have used the lodestar method, due to the scarcity of records of the number of hours actually expended on a case.

Early decisions regarding "reasonable" fees authorized courts to look to a wide variety of non-quantifiable factors in making the reasonableness determination. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (the number of hours devoted to a case was but one of 12 factors to consider in determining a reasonable fee). But as the practice of tracking hours became more universally accepted within the legal profession, courts began to see the advantages of the lodestar method and its use of relatively quantifiable and objective criteria. *Gisbrecht*, 535 U.S. at 801.

In 1983, this Court in *Hensley* embraced the lodestar method as the presumptively appropriate method for computing attorney fees. But perhaps because of the existence of a large body of case law that pre-dated the lodestar method and that had endorsed the use of a wide variety of other factors in determining the reasonableness of a fee request, the Court was reluctant to flatly prohibit use of those other factors. Instead, the Court repeatedly touted the virtues of the lodestar method while still leaving open the possibility of awards exceeding the lodestar amount in exceptional cases. *See, e.g., Hensley*, 461 U.S. at 435 (while actually

reducing the fee award below the lodestar amount, the Court stated in *dicta* that "an enhanced award *may* be justified" in some cases of "exceptional success") (emphasis added); *Blum,* 465 U.S. at 899 (while stating that the lodestar amount is "presumed" to be the reasonable fee under § 1988 and that superior quality of representation is generally reflected in the reasonable hourly rate, such superior work "may" justify an upward adjustment in a "rare case.").

As noted above, the Court's later decisions in *Delaware Valley I* and *Dague* considerably strengthened the presumption that the lodestar amount is *the* reasonable attorney fee contemplated by a federal fee-shifting provision. While still declining to shut the door all together on lodestar enhancements, the Court made clear that anyone seeking such an enhancement bears the burden of demonstrating that the enhancement is "necessary" to render the fee reasonable, and it absolutely prohibited any enhancement based on the attorney having assumed the risk that the plaintiff would not prevail (thereby losing any entitlement to a fee award). *Dague*, 505 U.S. at 562, 567. Importantly, in none of its fee-shifting cases has the Court upheld a lodestar enhancement, and thus its statements about the possible availability of such enhancements were largely *dicta*.

The Court for the first time is squarely faced with the issue of whether lodestar enhancements are *ever* permissible based on quality of performance or results achieved. A close examination of Congress's intent in authorizing "reasonable" fee awards to prevailing parties makes plain that neither of those factors justifies

the award of lodestar enhancements.

A. If the Lodestar Is Sufficient to Attract Competent Counsel, It Is Irrelevant Whether Counsel Has Performed Superbly

In support of it decision to award a 75% enhancement to Respondents, the district court cited its finding that counsel for Respondents had performed work of "superb quality." Pet. App. 151. That finding does not justify a lodestar enhancement because it bears no relationship to Congress's understanding regarding the reasonableness of a fee award.

As noted above, a "reasonable" fee is one that is "adequate to attract competent counsel," not one that pays counsel 100% of their after-the-fact, self-interested estimations of the value of their services. *Blum*, 465 U.S. at 893-94. An attorney who is contemplating taking on a representation involving a potential fee under a fee-shifting statute will be attracted to do so if (s)he can count on award of a fee (in the event the client prevails) that pays the attorney for every hour that (in the attorney's reasonable estimation) will be required to establish the client's claim, and that is based on an hourly pay rate that fairly compensates an attorney of his/her skill or experience. In other words, a competent attorney will be attracted to take on the representation by the promise of a lodestar fee. In order to be induced to take on the representation, the attorney will not need the promise of a lodestar enhancement in the event that his/her performance is subsequently deemed to be one of those truly "rare" cases in which the performance vastly

exceeds what could reasonably be expected of an attorney of his skill and experience, because the attorney would realize that "rare" events happen only rarely and thus have little or no bearing on the economics of taking on the case.

In sum, the ability of Respondents and similarly situated claimants to find competent counsel to represent their interests does not depend on the availability of a lodestar enhancement that potential counsel know to be only rarely available. In the opinion of the district court, Respondents were extremely fortunate to have attracted counsel capable of performing work (and who did perform) at a level far superior to what they could have expected from reasonably competent attorneys with similar levels of experience. But Respondent's good fortune bears no logical relationship to the "reasonable" fee mandated by § 1988(b) – that is, the fee necessary for Respondents to have attracted competent counsel.

B. If the Lodestar Is Sufficient to Attract Competent Counsel, It Is Irrelevant Whether Counsel Has Achieved Exceptional Results

For similar reasons, the fact that counsel for Respondents may have achieved exceptional results is irrelevant to the computation of a reasonable fee under § 1988(b). A n attorney who is contemplating taking on a representation involving a potential fee under a fee-shifting statute will be attracted to do so if (s)he can be assured that (s)he will be fairly compensated for every hour of time necessary to ensure that his/her client will

prevail – regardless whether the client prevails in truly exceptional fashion or (as will occur much more frequently) the client prevails in a fashion that the client could ordinarily have hoped for at the outset of litigation. Of course, to the extent that achieving truly exceptional results requires an expenditure of an increased number of hours or exercise of the attorney's exceptional skills and/or experience, those increased hours and skills/experience will be fully reflected in the lodestar amount – thereby eliminating any need for an enhancement above the lodestar amount.

The "superb results" identified by the district court in this case apparently were the product of herculean efforts on the part of Respondent's counsel. They reasonably expended 25,000 hours of billable time and employed the services of attorneys whose time was valued by the market at as much as $495 per hour. But those efforts were fully reflected in the $6.01 million lodestar amount computed by the district court. Respondents should be grateful for what their attorneys achieved. But they have not demonstrated that the promise of a lodestar enhancement was necessary to attract competent counsel willing to devote resources of this magnitude to the case. In the absence of such a demonstration, it makes no sense to require Perdue and other similarly situated defendants to compensate opposing counsel for "extra value" conferred on the plaintiffs above and beyond the compensation necessary to attract the competent counsel contemplated by Congress when it adopted § 1988(b).

II. BY HOLDING OUT THE POSSIBILITY OF ENHANCEMENTS BASED ON QUALITY OF PERFORMANCE AND RESULTS OBTAINED, THE COURT ENCOURAGES INEFFICIENT FEE DISPUTES

As noted above, the Court has become increasingly insistent that the lodestar fee is presumptively the "reasonable" fee contemplated under fee-shifting statutes. But it nonetheless has included statements in its decisions suggesting that, under factual scenarios not yet faced by the Court, lodestar enhancements might be warranted. *See, e.g., Dague,* 505 U.S. at 562.

Because the Court has not completely shut the door on the possibility of enhancements, the unsurprising result is that a high percentage of all fee requests under federal fee-shifting statutes include a request for an enhancement above the lodestar amount. Respondents argue that the Court need not concern itself with that issue because lodestar enhancements are granted only infrequently. *See, e.g.,* Brief in Opposition at 23 (stating that Respondents have identified only nine reported decisions since *Dague* was decided in which a fee applicant obtained a lodestar enhancement based on quality of representation and/or results obtained and in which the enhancement was not overturned on appeal). But whether such awards are rare is not the principal concern.[6] Rather, WLF is

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[6] Moreover, the district court's findings suggest that such enhancements are not nearly as rare as Respondents insist. To support its conclusion that the award of a lodestar enhancement

concerned that leaving the door ajar creates a highly inefficient system in which significant resources are being expended by attorneys and courts in debating whether the circumstances of an individual case are sufficiently exceptional to warrant an upward adjustment. Perdue's brief has thoroughly documented the vast scope of such fee disputes and the large number of reported decisions in which courts have addressed claims for lodestar enhancements. Resolution of such disputes cannot be deemed an efficient use of judicial resources. As the Court explained in *Dague*, in shutting the door on all lodestar enhancement claims based on contingency:

> The interest in ready administrability that has underlain our adoption of the lodestar approach, *see, e.g., Hensley*, 461 U.S. at 433, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation," *id.* at 437), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.

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was appropriate, the district court credited the declaration of Atlanta attorney Ralph Knowles, who stated that "successful class counsel in similar cases have received multiples of 1.5-5 times the lodestar." Pet. App. at 155. That finding suggests that despite the admonitions of *Delaware Valley I* and *Dague* that the lodestar fee is the presumptively reasonable fee, lower federal courts have routinely been granting lodestar enhancements to plaintiffs who successfully challenge the adequacy of government-run foster care systems.

Dague, 505 U.S. at 566.

WLF submits that this expensive search for truly extraordinary cases is not warranted. Use of the lodestar method is sufficient for determining a "reasonable" attorney fee in all, or virtually all, cases. Opening up the process to possible upward adjustment based on quality of performance and/or results achieved not only leads to needless expense but also, due to the absence of objective criteria for determining just when a case is extraordinary, is likely to lead to arbitrary, non-uniform application of the law.

Moreover, there is significant reason to doubt whether the courts ought to reward the achievement of extraordinary outcomes, because the law ought to be encouraging "just" results, not the result that happens to be the most advantageous to the plaintiff. The district court suggested that the outcome achieved in this case through settlement negotiations – a settlement approved by the court as just and reasonable – entailed injunctive relief that federal courts might well not have ordered if the case had been fully litigated. But as Judge Tjoflat pointed out in his opinion dissenting from the denial of rehearing *en banc*:

> Assuming that a court sitting in equity properly discharges its function in entering a just and legally appropriate injunction, whether following a bench trial or after consideration of a consent decree crafted by the parties, there can be but one qualitative result; in no such case can one result be any more "exceptional" than, or "superior" to, another.

Pet. App. 193-94.

One can assume that the settlement approved by the district court mandated the most appropriate equitable relief in light of the facts presented to the Court by counsel for Respondents. Thus, while Respondents are entitled to an award (as part of the lodestar) of a fee covering the cost and effort of bringing the relevant facts to the attention of the Court, it makes little sense to maintain rules that encourage the expenditure of resources for the purpose of identifying cases with truly extraordinary results, when the very existence of such a category is subject to serious question.

The federal courts have operated for more than two decades under a regime that contemplates the award of lodestar enhancements only in "rare" cases, if at all. There is nc reason to believe that eliminating the theoretical but highly unlikely possibility of enhancements based on quality of performance and/or results obtained will have more than an extremely minor impact on the willingness of attorneys to take on cases of individuals asserting claims under statutes that contain a fee-shifting provision. Accordingly, the burdens imposed on the judiciary by the continued existence of that slight possibility far outweigh any benefits (of the sort contemplated by Congress) created by leaving the door ever-so-slightly ajar.

III. THE COURT SHOULD PROHIBIT ALL ENHANCEMENTS OF THE LODESTAR AMOUNT

Perdue has convincingly demonstrated why lodestar enhancements are never warranted based either on the quality of counsel's performance or on the results achieved. But eliminating those rationales for lodestar enhancements is unlikely to reduce the large volume of enhancement requests so long as the Court leaves open the possibility of other rationales.

WLF notes, for example, that the district court based its 75% enhancement in part on contingency-related factors that the court deemed not to have been foreclosed by *Dague*. *See supra* at 4 & n.4. Thus, even if the Court were to instruct the district court on remand not to base a decision to enhance the lodestar on the quality of counsel's performance or the results achieved, the district court might deem itself free to adhere to a 75% enhancement based on these contingency-related factors.

Accordingly, WLF submits that the only way to put an end to wasteful and unproductive satellite litigation of the sort at issue here is for the Court to state categorically that calculation of a "reasonable" fee should focus solely on the lodestar calculation and that no upward adjustments from the lodestar amount are permitted. There is no convincing evidence that the lodestar methodology is incapable of computing a "reasonable" fee in any discernable class of cases.

In particular, the evidence does not support a

claim that enhancements are necessary to ensure that "unpopular" litigants are able to attract competent counsel. In his concurring opinion, Judge Carnes expressed a concern that lodestar enhancements might be appropriate in cases involving unpopular litigants, because some attorneys might be reluctant to take such cases for fear that the client's unpopularity might rub off on them and thereby impair their ability to recruit future clients. Pet. App. 49-57.

There is no evidence, however, that a reputation for representing unpopular clients harms an attorney's business prospects.[7] To the contrary, the example of Atticus Finch – an attorney willing to represent any client in need of representation, no matter how unpopular – for decades has been held up in the popular imagination as the ideal of a public-minded attorney. *See* Harper Lee, *To Kill A Mockingbird* (1960). And even if attorneys living in Town X might be reluctant to take on a particular case for fear of offending some of the residents of the town, the availability of attorneys from other cities and towns eliminates any realistic possibility that local prejudice would present a significant obstacle to obtaining representation.

The bombing of the federal building in Oklahoma

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[7] Of course, Respondents can make no claim that *this* case involves unpopular class of clients whose unpopularity makes it difficult to attract legal representation. *See, e.g.*, Pet. App. 207 n.2 (Carnes, J., dissenting from denial of rehearing *en banc*) ("No one contends that this is a case where the clients were detested, the litigation was unpopular, or the attorneys' standing in their profession or community suffered in the least. In fact, just the opposite is true.")

City in 1995 provides a good example of the willingness of attorneys to take on unpopular clients. The two individuals implicated in that bombing, Terry Nichols and Timothy McVeigh, can fairly be described as among the most unpopular litigants in the United States during the past several decades. Their attorneys are not in a position to boast that their unusual skills produced extraordinary results for their clients: both defendants were convicted of murder, McVeigh was executed for his crimes, and Nichols received a life sentence.

Thus, if it were true that attorneys are fearful that a reputation for having represented very unpopular clients would be bad for future business, then one would expect that attorneys for Nichols and McVeigh would have wanted to suppress information about their involvements in the case. But the precise opposite has proven true. Ronald G. Woods and Michael E. Tigar (counsel for Nichols) and Stephen Jones (counsel for McVeigh) have widely publicized their involvement and list that involvement on professional web sites as among the major achievements of their legal careers. *See, e.g.*, Stephen Jones and Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America,"* 51 Okla. L. Rev. 617 (1998); Michael E. Tigar, *Defending*, 74 Tex. L. Rev. 101 (1995); attorney profile for Ronald Woods at www.ronwoodslaw.com (last visited June 26, 2009) (listing representation of Terry Nichols as among Mr. Woods's major achievements). The Nichols/McVeigh example is typical; attorneys regularly publicize their representation of notorious, unpopular clients, presumably on the theory that the public will view such representation as evidence both of a high degree of legal skills and of a willingness to fight for

one's clients regardless of personal costs.

In sum, WLF urges the Court to adopt a rule establishing the lodestar amount as a ceiling on the award of attorney fees under fee-shifting statutes. If the court instead merely prohibits lodestar enhancements based on quality of representation and/or results achieved, enterprising attorneys (who no doubt sincerely believe that their services are worth more than the lodestar amount) will find other grounds for requesting enhancements and will continue to flood the federal courts with such requests.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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